

# COMITÉ MARITIME INTERNATIONAL

## International Working Group (Polar Shipping)

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## WORKING PAPER ON THE LEGAL FRAMEWORK FOR SHIP'S PASSENGER RIGHTS IN ARCTIC WATERS

### FINAL REPORT

(6 September 2021)

This report was prepared by the passenger rights sub-committee of the CMI International Working Group on Polar shipping with contributions from members of the committee and assistance from local lawyers as detailed in the text. It is our hope that the report will shed light on the conditions that this highly specialized tourist industry operates under and some of the legal issues that it entails.

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## **1. Introduction**

It is anticipated by the Sub-Group that cruise and adventure passenger vessels will increasingly extend their range and frequency of operations in Arctic and Antarctic waters. Navigation risks in these environments are increased because many navigable waters and channels are uncharted at all or the charts have not been updated. Navigation aids might be minimal, and search and rescue services are generally located far away. Further, in case of major casualties with many injured passengers, there may not be enough hospital beds available. As this type of passenger shipping increases in such areas, the question arises: how are passenger rights addressed, with respect to the specific risk exposure? It is an added complication that a number of jurisdictions are potentially in play and so this report addresses the issues from the perspective of the Arctic coastal states.

Readers are encouraged to seek additional information from additional sources such as Association of Arctic Expedition Cruise Operators<sup>1</sup> and the Arctic Council.<sup>2</sup>

## **2. Scope of the report**

This report is intended as a comparative study of passengers' rights when travelling in the Arctic for leisure with an emphasis on accidents and personal injury. The report covers the five Arctic states and includes factual details about each state relevant to the carriage of passengers at sea, policies and regulations. Further, the national legislation with respect to passenger rights is set out for each individual state.

The scope is commercial carriage of passengers; including cruise but not shore based adventure tourism or scientific expeditions. The ambition is to give an overview rather than to resolve individual cases.

## **3. Particularities/special risks, facilities and national policies**

### **3.1 United States – Alaska<sup>3</sup>**

#### ***Towns and Villages Along Alaska's Arctic Coastline That Might Provide Support to Vessels or Passengers in Distress***

The coastline of arctic Alaska extends from Alaska's border with Canada to the Bering Strait that separates Alaska from the east coast of Russia. The northern coastline is bounded by the Beaufort Sea, which lies to the east of Point Barrow, while the Chukchi Sea extends westward from Point Barrow to the tip of the Seward Peninsula, which forms the eastern side of the Bering Strait.

Like other polar regions, arctic Alaska is remote. Uninhabited shorelines extend for hundreds of kilometers between small towns and villages, which have limited resources to assist vessels or passengers in distress. Sea ice forms in the fall and remains nearshore until late spring/early summer. Due to ice and weather, passenger excursion vessels can only operate in this region from July through October. South of the Bering Strait lies the Bering Sea which, while not technically above the Arctic Circle, is also a remote region in which passenger excursion vessels face many of the same challenges as those operating in the remote Arctic.

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<sup>1</sup> AECO | Association of Arctic Expedition Cruise Operators.

<sup>2</sup> Arctic Council - As Arctic marine tourism increases, how can we ensure it's sustainable? ([arctic-council.org](http://arctic-council.org)).

<sup>3</sup> Contributed by Bert Ray, Schwabe Williamson & Wyatt.



As noted, a few small towns and villages located along Alaska's arctic coast might be able to provide aid to passengers with medical problems or vessels in distress. However, due to shallow coastal waters and little or no harbor infrastructure in those towns, a passenger needing emergency medical assistance onshore might need to be transported to shore by a helicopter or a small skiff, depending on the location of the vessel. If needed, a medevac flight can be arranged from airfields located in these towns and villages to Anchorage, Alaska, approximately 1,000 kilometers to the south, where most medical facilities in the state are located.

Deadhorse is a small, unincorporated community at Prudhoe Bay, a large industrial oil field complex located approximately 320 kilometers west of the Canadian border. A wharf and dock support vessels engaged in offshore exploration work are used to unload barges delivering cargo for energy companies operating on Alaska's North Slope. Due to shallow water, only barges and shallow draft vessels can reach these structures. Commercial jets operate from a large airfield at Deadhorse. Privately chartered helicopters are sometimes present at the airfield at Deadhorse, but these are typically engaged in work for oil exploration companies and may not be available to respond to a request for assistance from a passenger vessel.

Approximately 500 kilometers to the east of Deadhorse, near Point Barrow, lies the town of Utqiagvik (formerly Barrow). With a population of approximately 4,200, Utqiagvik is the largest town in the Alaskan arctic. In addition to a commercial airport, the town has a hospital, several hotels and restaurants, and commercial stores. There are no commercial docks or waterfront facilities at Utqiagvik due to the shallow offshore water.

The town of Kotzebue, located on the western coast of Alaska on the Chukchi Sea, is the shipping and transportation hub for northwest Alaska. Passengers can be ferried ashore by skiffs to a pier near the town. Hotels, restaurants, and commercial stores are located in Kotzebue, as well as a primary health care facility. Commercial jet service is available year-round at the local airport. A few exploration cruise voyages start or end their voyage in Kotzebue.

The city of Nome, Alaska is located approximately 300 kilometers south of Kotzebue, just south of the Bering Strait. Located on the Norton Sound, an extension of the Bering Sea, Nome is a regional

transportation hub, serviced by air and marine traffic. Passenger vessels and cargo ships call at Nome. Facilities in Nome include hotels, restaurants, commercial shops and a hospital. Several passenger excursion vessels begin or end their voyages in Nome.

In addition to Deadhorse, Utqiagvik and Kotzebue, there are a number of small native villages located along the arctic coastline of Alaska. However, these towns have no developed port facilities and very limited infrastructure. Air transportation to these villages is limited to small planes, and requires good weather.

### ***United States Coast Guard Resources***

In order to expand the United States' presence in the Arctic, the United States Coast Guard ("USCG") adopted an Arctic Strategy in 2013.<sup>4</sup> One of the goals of this strategy is to ensure safe, secure and environmentally responsible maritime activity in the Arctic. The USCG has two polar-class icebreaker cutters in its fleet, but only one is currently operational. The United States Congress has authorized funding to construct additional icebreakers, with the first new icebreaker scheduled for delivery in 2024. During the summer months, other USCG vessels may also be present in ice-free areas of the Arctic.

The USCG operates a seasonal base in the Arctic. In past years, the base has been established in either Kotzebue or Utqiagvik. USCG helicopters and personnel are deployed to this seasonal base. In the event of a medical emergency involving a passenger on a vessel, the USCG may be able to launch a helicopter from this base to bring the passenger to shore, depending on the location of the vessel, the availability of a helicopter, the severity of the medical condition, and weather conditions.

### ***Nautical Charts***

Coastal waters in Alaska's arctic region tend to be shallow, with shifting shoals due to the action of ice and currents. Small-scale nautical charts (ranging in scale from 1:1.5 million to 1:5 million) are available for many areas lying offshore of the Alaska Arctic. However, many of these offshore areas were surveyed with imprecise technology, in some cases dating back to the 1800's. Consequently, confidence in the region's nautical charts is low.

Generally speaking, surveying offshore arctic waters has not been considered a high priority for the National Ocean Service, due to the low volume of commercial traffic in the area. As of 2018, only 4.1 percent of U.S. maritime Arctic had been charted to modern international navigation standards. However, the National Ocean Service has designated 38,000 square miles of coastal waters as survey priority areas. With current resources, it will take 25 years to survey these areas.

Newer large-scale charts (providing 1:90,000 – 1:400,000 scale coverage) are available for some coastal areas, including the approaches to the harbors in Kotzebue and Nome, and areas where surveys have been conducted to support oil and gas exploration and production activities. Additional new charts are planned as part of the National Ocean Service's strategic plans for the Arctic.

### ***Current Status of Passenger Vessels Transiting Alaska Arctic Waters***

With a few exceptions, most passenger vessels operating in Alaska's arctic are small exploration vessels rather than large cruise ships. These vessels offer exploration cruises that explore islands and coastal areas of the Bering or Chukchi Seas, where large numbers of seabirds and marine mammals are found. Most of these vessels have voyages beginning or ending in Nome, Alaska, but a few operate from Kotzebue.

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<sup>4</sup> <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5pw/Arctic%20Policy/USCG%20Arctic%20Strategy.pdf?ver=2017-10-05-123403-330>.

A few large cruise ships have transited Alaska's arctic coast in the past, on voyages between Alaska and the U.S. east coast, Greenland or Europe. But the costs and logistics of such a passage are such that there is not currently a significant demand for such cruises. Some of these larger vessels have sailed with a tug escort and helicopters.

In addition to smaller excursion vessels, large passenger vessels offer cruises along the Aleutian Island chain, at the beginning and end of the Alaska cruise season, as they transition between Alaska and Asia.

### ***National Policies and Regulation***

At the request of the United States and Russia, the IMO established six voluntary two-way shipping routes in the Bering Sea and Bering Strait in 2018.<sup>5</sup>

There are no federal statutes that impose any operational requirements specific to passenger vessels operating in arctic waters, other than provisions implementing the Polar Code. The volume of passenger vessel traffic to date has not been significant, and there have been no major casualties or losses that would prompt the adoption of such provisions.

Both federal law and Alaska law require the operators of passenger vessels greater than 400 gross tons to develop a vessel response plan (VRP) to respond to an oil spill from the vessel.<sup>6</sup> Limited oil spill response resources are stored in the towns and villages along Alaska's arctic coastline. Because there are inadequate response resources to respond to an oil spill in the arctic within the timeframes required by the federal requirement, VRP's are reviewed by the Coast Guard using Alternative Planning Criteria (ACPs) which require the vessel operator to take additional precautionary measures designed to prevent accidents and spills from occurring.

Native Alaskans living on the arctic coastline engage in subsistence hunting of bowhead whales and other marine mammals during the summer open water season. To avoid interfering with these activities, vessels engaged in offshore seismic exploration activities have agreed to avoid hunting areas during times when subsistence hunting is taking place.

The Arctic Waterways Safety Committee (<http://www.arcticwaterways.org/home.html>) was established in 2014 to bring together local marine interests to develop best practices to ensure a safe, efficient and predictable operating environment in arctic Alaska waterways. Members of the committee include representatives of Alaska native subsistence hunters, the oil and gas industry, the tourism industry, local towns and villages, and vessel operators. The goal of the Committee is to develop standards of care for vessels operating in this region.

Vessels operating within three miles of Alaska's coastline are required to carry a state pilot. However, unless a vessel is bound for an Alaskan port, most passenger vessels remain well offshore due to shallow waters along the coast and low confidence in the accuracy of charts. Vessels use skiffs to transport passengers to shore for shore-side excursions.

Under United States law, operators of foreign flagged cruise ships may not use the ship's passenger tender boats or the ship's crew to conduct such excursions. Rather, they must use passenger skiffs built in the United States and must employ United States mariners to operate them.<sup>7</sup>

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<sup>5</sup> <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/NCSR5.aspx>.

<sup>6</sup> 33 U.S.C. §1321(j)(5); 33 C.F.R. 155.5035; Alaska Stat. 46.04.055(f) & 46.04.900(11).

<sup>7</sup> Passenger Vessel Services Act, 46 U.S.C. §55103; United States Coast Guard Field Notice 01-2018 (Jan. 23, 2018) available at: <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CSNCOE/Industry%20Notices/CSNCOE%20Field%20Notice%20001-2018%20-%20Tender%20and%20Excursion%20Vessels-signed.pdf?ver=2018-01-24-123444-217>.

### 3.2 Norway - Svalbard<sup>8</sup>

#### *About Svalbard*

Svalbard is an archipelago in the Arctic Ocean, situated between the northern coast of Norway and the North Pole, situated between 74 and 81 north latitude and between 10 and 35 east longitude. The largest island is Spitsbergen, followed by Nordaustlandet and Edgeoya. The largest settlement is Longyearbyen. The main industries are coal mining, tourism and research. Cruise ship voyages are a significant part of the tourism industry, including both calls by offshore vessels and cruises starting or ending in Svalbard.

More than 60% of Svalbard is covered by glaciers, permanently with snow and ice. The archipelago has many mountains and fjords. In order to preserve the largely untouched and fragile natural environment, more than two thirds of the archipelago are included in national parks and nature reserves. Svalbard has an Arctic climate, however with significantly higher temperatures than other areas situated at the same latitude.

The Svalbard Treaty of 1920 recognises Norwegian sovereignty over Svalbard, and according to the Svalbard Act of 1925 (The Svalbard Act of 7 July 1925 no.11). Svalbard is a full part of the Kingdom of Norway. According to the Treaty, all activity on Svalbard is subject to Norwegian legislation. Administratively, the archipelago is not part of any Norwegian county, but forms an unincorporated area administered by a governor appointed by the Norwegian government.

As a main rule, according to the Svalbard Act section 2, Norwegian civil law, criminal law and laws regarding the applicability of the law applies on Svalbard, unless otherwise stated. Other types of laws do not apply in Svalbard, unless otherwise specifically stated. The Svalbard Act section 3 gives specific rules regarding laws regulating certain public services and their applicability to Svalbard. Regulations for Svalbard on specific areas can be adopted according to the Svalbard Act section 4.

International agreements ratified by Norway will, as a general rule, apply to Svalbard, unless otherwise declared in connection with the ratification of the agreement. The agreement on the European Economic area does not apply to Svalbard. However, EEA relevant legislation incorporated into the EEA Agreement may be given applicability to Svalbard, normally in connection with the implementation of the legislation into Norwegian national law.

#### *Environmental protection*

The Svalbard Environmental Protection Act (Svalbard Environmental Protection Act of 15 June 2001 no. 68) and related regulations applies to the islands of Svalbard and the territorial waters which extend 12 nautical miles outside the baseline. The purpose of the Act is to preserve a virtually untouched environment in Svalbard with respect to continuous areas of wilderness, landscape, flora, fauna and cultural heritage.

As a fundamental principle for access and passage in Svalbard, The Svalbard Environmental Protection Act section 73 states that all access and passage in Svalbard shall take place in a way that does not harm, pollute or in any other way damage the natural environment or cultural heritage or result in unnecessary disturbance to humans or animals. Anyone staying in or operating an undertaking in Svalbard shall show due consideration and exercise the caution required to avoid unnecessary damage or disturbance to the natural environment or cultural heritage (section 5).

A head of undertaking shall ensure that every person who carries out work or takes part in the activities for which an undertaking is responsible is aware of the provisions set out in or pursuant to this act regarding the protection of Svalbard's flora, fauna, cultural heritage and the natural environment

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<sup>8</sup> Contributed by Katrine Heier, Kjersti Tusvik, Officer EFTA internal market division and Lars Rosenberg Overby, partner IUNO Law Firm.

otherwise (section 5). Exercise of authority under the act shall build on the precautionary principle and the overall environmental pressure on the natural environment and cultural heritage (sections 7 and 8).

### ***Access and safety precautions***

It is required that any person travelling to or living in Svalbard must be able to support her or himself. According to the Svalbard Treaty, citizens of all countries signatories to the treaty have equal right of access to Svalbard. Foreigners do not need a visa to enter Svalbard. However, a visa for the Schengen area is required when travelling via the Norwegian mainland. Everyone travelling to Svalbard must be able to prove their identity with a passport, or, for Norwegian citizens, an ID card, a Norwegian driving licence or a Norwegian bank card.

Safety precautions must be top priority when travelling in Svalbard. The conditions can be challenging in terms of changing weather conditions, winds, difficult waters and landings, sea ice/drift ice, glaciers, fog and polar bears, among other things. Due to the risk of encountering polar bears, visitors travelling in Svalbard must always have firearms and protection devices at hand, such as a big-game rifle and ammunition for self-defence, flare gun or an emergency signal flare pen for driving off polar bears and tripwire with flares for camping. For trips outside Management Area 10 it is required to bring an emergency beacon and a satellite telephone, as there is limited range for mobile phones in Svalbard.

### ***National policies and regulations on pilotage***

Norway requires pilots in waters within the baselines. The basic principle set out in the Compulsory Pilotage Regulations Section 3 is that any vessel of 70 meters or more, and with a width of 20 meters or more, requires pilots in waters within the baselines<sup>9</sup>. For certain categories of vessels stricter rules apply, such as passenger vessels and vessels carrying dangerous and polluting cargo. For passenger ships certified for more than 12 passengers and which are carrying passengers, all vessels over 50 meters are subject to compulsory pilotage.

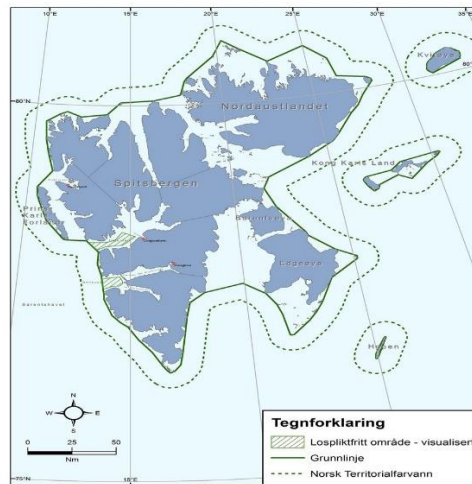
The compulsory pilotage requirement can be met by either using the state pilot service or by obtaining a Pilot Exemption Certificate (PEC). The Norwegian Coastal Administration is responsible for the state pilot service and the administration of the Pilot Exemption Certificate (PEC) scheme. A list of boarding areas has been established in order to enable the enforcement of the pilot requirements. The boarding areas can be found by using the Norwegian Coastal Administration's interactive map.<sup>10</sup> Certain areas are exempt from compulsory pilotage for vessels in transit to or from the pilot boarding area. The pilot boarding areas and exempt areas in Svalbard are set out in the regulation relating to ports and fairways on Svalbard § 3 d) and defined geographically in annex 1 to the regulation.

The rules and regulations on pilotage have been made applicable to Svalbard, thus introducing the state pilotage service, compulsory pilotage and PEC on Svalbard, by Regulation relating to ports and fairways in Svalbard of 12 March 2021, which sets out certain amendments for Svalbard in section 3(d). The solid green line in the graphic below represents the baseline. The dashed areas are areas that do not require pilots.

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<sup>9</sup> The Coastal Administration may exempt a vessel from the pilot requirements or using a Pilot Exemption Certificate (PEC) for an individual voyage, in case of pilot shortage or in the event that it is deemed unreasonable to force pilot requirements and it appears obviously safe to provide an exemption cf. the Compulsory Pilotage Regulations Section 8. In certain cases, the Norwegian Coastal Administration may also decide to make the use of a pilot compulsory for a specific sailing, even outside the baselines.

<sup>10</sup> <https://kart.kystverket.no/>.



Graphic 2: Pilot requirements in Svalbard.<sup>11</sup>

### ***National policies and regulations on ports and fairways***

Following the Regulation relating to ports and fairways in Svalbard of 12 March 2021, the Ports and Fairways Act is in effect in Svalbard, including territorial waters and internal waters, with certain adjustments stated in the regulation. The regulations include provisions on position reporting.

### ***Tour operators***

According to the Svalbard Tourism Regulation Section 7, a tour operator must provide insurance – in addition to a travel guarantee – due to the increased risk of rescue operations. The tour operator is also responsible for their participants' security and behaviour at all times under Section 5 and must be competent in fields such as Svalbard regulations, security (polar bear, glacier and avalanche safety) and first aid.<sup>12</sup>

The tour operators are required to report their activities to the Governor of Svalbard no later than eight weeks before the activities are scheduled to start, and in the event of a voyage by sea, a sailing itinerary must be provided, as well as scheduled disembarkations.<sup>13</sup> The geographical scope of the Svalbard Tourism Regulation is all the land areas of Svalbard, as well as sea areas until the territorial limits.<sup>14</sup>

Generally, tour operators seeking to offer cruises or other types of tourism or expeditions in Svalbard should always seek the assistance of the Governor of Svalbard in relation to current regulations, as the distinctiveness of the regulations in the area cover many aspects of planned tourism or excursion operations.

### ***National parks and nature reserves***

Svalbard has several national parks and nature reserves, shown in the graphic below. There are fuel requirements for ships that call in the Svalbard national parks (DMA in accordance with ISO 8217 Fuel Standard). In the nature reserves, ships cannot have more than 200 passengers on board.<sup>15</sup>

<sup>11</sup> Graphic provided by the Coastal Administration .

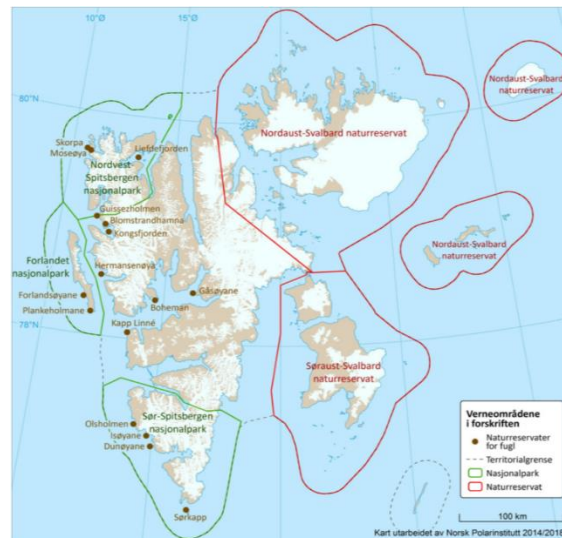
<sup>12</sup> The Svalbard Tourism Regulation Section 6 .

<sup>13</sup> The Svalbard Tourism Regulation Section 8.

<sup>14</sup> The Svalbard Tourism Regulation Section 2.

<sup>15</sup> The Svalbard National Park Regulation Section 4 and Section 16.





Graphic 1: Map of national Parks and Nature Reserves in Svalbard.<sup>16</sup> The green areas mark the national parks, while the red areas represent the nature reserves. Black circles represent special bird nature reserves.

### ***Search and rescue in Svalbard***

Rescue operations in Svalbard are often carried out under extreme weather and temperature conditions and in exposed areas, which poses great demands on personnel and resources.

The Governor of Svalbard is responsible for planning, leading and coordinating the Rescue Service for Svalbard under the overall direction of the Joint Rescue Coordination Centre of Northern Norway. The search and rescue service is part of the Norwegian rescue service and organized in the same way as on the mainland. It relies on voluntary efforts, including the Red Cross and the Rescue Corps. Government agencies and private companies also have resources and personnel important to the rescue service. The Governor of Svalbard is responsible for all air ambulance services on the archipelago and in adjacent sea areas outside Longyearbyen.

The Governor has access to two rescue helicopters, equipped for flying in extreme cold conditions and with long range, auto hover function and thermal camera, night flying and de-icing equipment. Between March and December, the Governor has the expedition and research vessel MS Polarsyssel at its disposal, including a helicopter deck and an operation command room. In addition, the Governor has access to a variety of emergency response equipment, including glacier rescue equipment and oil spill response equipment.

Several environmental emergency operations have been carried out in Svalbard, sometimes under extreme conditions including extreme cold, darkness, large distances and limited communication possibilities.

### ***Special legislation***

Svalbard is a legal unicorn. The laws and regulations described above are only a fraction of the vast number of rules and regulations particular to Svalbard.

<sup>16</sup> Map provided by the Norwegian Polar Institute.

### 3.3 Greenland (Denmark)<sup>17</sup>

#### *About Greenland*

Greenland is a self-governing country within the Kingdom of Denmark. It is located in the Arctic and has a population of approx. 56,000 people; most of whom are Inuit. Greenland's area is about 2.2 mill. km<sup>2</sup> and 80% is covered by ice.

Greenland enjoys extensive self-governance but areas such as defence, security and foreign affairs are not taken over by the government of Greenland but are governed by the government of Denmark. Greenland is not a member of the EU but an OTC ("Overseas Countries and Territories). In 2009 the Act on Greenland Self-Government was granted to Greenland and was an extension of powers and included some achievements in international law such as the recognition of Kalaallit (Greenlanders) as people, but also the opportunity to become an independent state. Today, Greenland is a self-governing unit within the Danish realm and the Danish constitution also applies to Greenland. Most laws adopted by the Danish parliament also apply to Greenland unless Greenland is specifically exempted but Greenland also have their own laws. Greenland has jurisdiction over its inner territorial waters (3 NM).

#### *National policies*

The maritime traffic continues to increase in Greenland with ice receding due to climate change. This means that passenger vessels –may now navigate waters in the summer that were not previously accessible and hence growing tourism. New routes through the Northern Sea Route and the Northwest passage generate increased traffic by cargo vessels and this in turn enhances the navigational risks.

In addition, the extreme weather, ice, wind and low temperatures pose objective hazards to passenger vessels. Greenland's coastline is approx. 44,000 km and it is sparsely populated. Onshore resources are limited, and, in some areas, basic survival needs like food, running water and access to hospitals and/or doctors could be in short supply.

The Danish Maritime Authorities have adopted various regulations and policies in order to prevent accidents and mitigate the effect of such accidents. Cruise vessels receive special attention.

The work is performed in a dialogue with the self-rule government of Greenland and maritime safety is also a priority of the Arctic Council.<sup>18</sup> Interestingly, the Arctic Expedition Tour Operators are regarded as a potential asset response-wise by the Arctic Council's Emergency Prevention, Preparedness and Response Working Group (EPPR).<sup>19</sup>

Information about national and international orders, regulations and guidelines is available on the web page of the Danish Maritime Authority.<sup>20</sup> The authority participates in the *Arctinfo* programme managed by the Norwegian Coastal Administration ("Kystverket"). Arctinfo is an Internet based service that collects and communicates information to those navigating the Arctic.<sup>21</sup>

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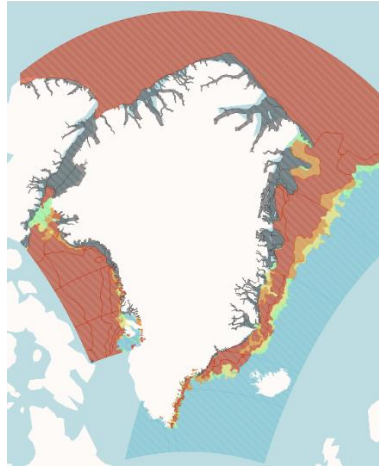
<sup>17</sup> Contributed to by Lena Holm Saxtoft Assistant Vice President, Skuld and Lars Rosenberg Overby, partner IUNO Law Firm.

<sup>18</sup> The Danish Arctic policy is described Henriksen, "Norway, Denmark (in respect of Greenland) and Iceland" in Beckman and other (eds.) *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and Use States* (Brill Nijhoff 2017).

<sup>19</sup> See [Arctic Council - From Risk to Rescue \(arctic-council.org\)](http://arctic-council.org).

<sup>20</sup> See [Navigation in Greenland \(dma.dk\)](http://dma.dk).

<sup>21</sup> See [ArcticInfo | ArcticInfo - BarentsWatch](http://ArcticInfo.org).



Snapshot of Greenland and its waters from Arctinfo 13 May 2021 depicting total ice concentration of varying degrees from grey (10/10), brown, yellow to light green (2/10). Blue areas are open waters.

### ***The Polar Code***

Denmark and Greenland have not enacted the Polar Code *en bloc* but have adopted it in various legislation depending on the nature of the regulation.<sup>22</sup> The CDME (Construction, Design, Manning, Equipment) rules and requirements are stricter than contemplated in the Polar Code. For example, a vessel with a capacity of more than 250 passengers is subject to stricter construction requirements, such as a minimum ice class of Baltic Ice Class 1 C or equivalent when trading in the Northern navigation zone, whether or not there is any ice.

There are additional rules regarding voyage planning and preparedness for maritime accidents. This entails i.a. submitting a voyage plan before entering Greenland water that takes limited SAR availability into account. If the capacity exceeds 200 passengers the vessel must document assistance from other vessels or that SAR facilities are available within a reasonable time horizon. This means that passenger vessels of this size have to travel in tandem. Regular reports shall be submitted to the authorities and risk assessment is a continuing obligation. Open lifeboats are not allowed and vessels must have ice search lights. Recommended sea routes outside Nuuk must be followed and the master is responsible for ensuring safe distance to icebergs.

### ***Mandatory pilotage***

Vessels carrying more than 250 passengers are obliged to use a certified pilot in the inner and outer territorial waters of Greenland (that is 3 NM from the baseline).

### ***The search and rescue service in Greenlandic waters***<sup>23</sup>

The management of the search and rescue service (SAR) in Greenland is divided between Joint Arctic Command (JACMD), the Air Rescue Coordination Center and the Commissioner of Police in Greenland. Joint Arctic Command Denmark is a joint operational territorial command comprised of personnel from all services in the Royal Danish Armed Forces; Navy, Airforce, Special Forces and Army. It also employs civilians from Denmark, Greenland the Faroe Islands. Joint Arctic Command and

<sup>22</sup> For a detailed summary see Rosenberg Overby, The implementation of the Polar Code in Denmark and Greenland in JIML vol. 24 issue 6 (2018).

<sup>23</sup> Information as stated at Message List (soefartsstyrelsen.dk).

the Air Rescue Coordination Center are co-located in Nuuk. JACMD, which operate the Joint Rescue and Coordination Centre (JRCC) Greenland, is responsible for the management of the maritime rescue service, meaning the search and rescue of vessels in distress of any type on or below the surface of the sea, irrespective of whether the measures are carried out at sea, from the air or ashore. The Danish Transport Authority, which operates the Flight Information Center (FIC) Sondrestrom, is responsible for the management of the air navigation service, meaning search and rescue of persons in distress by aircraft, irrespective of whether the measures are carried out from the air, at sea or ashore. Air Greenland currently represents the civilian SAR helicopter emergency response in Greenland in cooperation with JACMD and the Police in Greenland. The Commissioner of Police in Greenland is responsible for the management of the local rescue service, meaning search and rescue operations in local sea areas, as well as for search and rescue operations ashore. However, at any time each individual master bears the full responsibility for their own ship and crew. In this connection, attention is drawn to chapter V, regulation 33, of Notice B from the Danish Maritime Authority (identical to SOLAS convention, chapter V, regulation 33), according to which the master of a ship, be it Danish or foreign, who receives information from any source while at sea that persons are in distress at sea and who is able to provide assistance is bound to proceed with full speed to their assistance. Any master who, at his own initiative, launches a search or rescue operation in Greenland waters must, as soon as possible, inform JACMD about the decision taken.

#### **4.4 Russian Federation<sup>24</sup>**

##### ***Background***

The Russian Federation is expanding its Arctic transport capabilities, paying special attention to the transportation of goods and attracting carriers for these purposes on the basis of a public-private partnership. Passenger shipping between individual ports is extremely poorly developed, and cruise shipping is practically absent. The main projects for the development of the port infrastructure of the Arctic Basin are associated with the development of oil and gas fields in Yamal, as well as the comprehensive development of the Murmansk transport hub. These projects are the modern growth points for the Arctic regions.

Many travelers, both Russians and foreigners, dream of going through the Northern Sea Route. The melting of ice has significantly increased the duration of the shipping season, but only a few tours are offered by Russian travel agencies. All that could be offered are excursion tours on an icebreaker to the North Pole, cruises on expedition ships along the Northern Sea Route (as a rule, twice a year) from Anadyr to Murmansk lasting 27 days, including landing on uninhabited islands, visiting Franz Land - Yosef, Novaya Zemlya, Novosibirsk Islands and Wrangel Island.

##### ***Special risks***

- low level of development of transport infrastructure, including those designed for the functioning of small aircraft and the implementation of year-round air transportation at affordable prices, the high cost of creating such infrastructure facilities;
- the lack in the development of the infrastructure of the Northern Sea Route, the construction of icebreaker, rescue and auxiliary fleets from the deadlines for the implementation of economic projects in the Arctic zone;
- the lack of an emergency evacuation system and the provision of medical assistance to passengers and crew members of ships in the water area of the Northern Sea Route;

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<sup>24</sup> Contributed by Alexander Skaridov, Professor St. Petersburg Maritime University, Head International and Maritime law Chair.

- inconsistency between the rates of development of the emergency rescue infrastructure and the public safety system and the rates of growth of economic activity in the Arctic zone.

The above risks are mentioned in the “Strategy for the Development of the Arctic Zone of the Russian Federation and ensuring National Security for the Period until 2035”.

Also, lack of special passenger ships suitable for passenger traffic in Polar waters should be mentioned, as well as terrible weather and ice conditions are traditionally singled out as threats, but they are not recorded in the legislation framework.

### ***National policies***

Russian maritime transport is an essential component of the state program for development of the Polar territories. Russian national maritime transport policy (MNTP) in the Arctic regional area is determined by the priority to ensure the free access to the Arctic spaces, control the NS routes and provide safety exploration of the natural resources on the continental shelf and sustainable development of biological species in exclusive economic zone of the Russian Federation.

No particular provisions are devoted to maritime tourism in Polar areas, yet.

## **4.5 Canada<sup>25</sup>**

### ***Navigation risks***

Many areas of Canadian Arctic waters have not been surveyed and the navigation risk this presents to Arctic shipping, particularly eco-tourism/passenger vessels who often navigate close to shore or in confined waters, is exemplified in the 2017 decision of Canada’s Federal Court in *Adventurer Owner Ltd vs Her Majesty The Queen in Right of Canada* (the M/V CLIPPER ADVENTURER)<sup>26</sup>.

The waters in question were in Canada’s Coronation Gulf (Nunavut Territory), when the CLIPPER ADVENTURER was en route from Port Epworth to Kugluktuk. The ship was carrying 128 passengers with a crew of 69 and ran hard aground in good weather on an uncharted, submerged shoal (August 27, 2010). This was day 13 of a fourteen-day expedition cruise in the waters of Greenland and Canada. None of those aboard were injured. The passengers and non-essential crew were rescued by a Canadian icebreaker and taken to Kugluktuk.

The incident highlighted three areas of particular risk with respect to such navigation namely (i) rescue, (ii) salvage and recovery and (iii) knowledge of local waters and voyage planning.

From a rescue point of view the passengers and crew remained aboard for two days awaiting the Canadian ice breaker. Fortunately, they were secure (the ship had power and sufficient food and services) and the rescue vessel was not far away. The transfer to the rescue vessel took place without incident. However, the consequences would doubtless have been more dramatic and potentially more dangerous had circumstances not been so favourable.

In terms of salvage and recovery, as the ship was heavily aground (more than half its length of 100 m), four tugs were required to bring the ship afloat (damage to its double bottom tanks was fortunately limited) some 17 days after the incident. Temporary repairs were conducted in northern Canada and in Greenland with further inspection in Iceland. Permanent repairs took place in Poland with a final cost of US\$13.5 million (including salvage cost, business interruption and related matters). The initial and

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<sup>25</sup> Prepared by Peter J Cullen, Senior Counsel with Stikeman Elliott LLP (Montreal, QC) with the assistance of Simon Ledsham, associate with Stikeman Elliott LLP (Montreal, QC).

<sup>26</sup> 2017 FC 105, upheld by the Federal Court of Appeal, 2018 FCA 34.

limited repairs (before the Iceland inspection) were to ensure the ship could promptly exit Arctic waters before the onset of the Arctic winter. These efforts highlight the absence of sophisticated local repair facilities and the short navigation window to effect repairs and return to service.

However, the main focus of the case was knowledge of local waters and voyage planning. The shipowners sued the Crown to recover their damages alleging that the Canadian Coast Guard and the Canadian Hydrographic Services, who were aware of the presence of the uncharted shoal, failed to warn seafarers of its presence. They argued that the Crown had a duty to warn the public and failed to do so. In making such arguments it was clear that the shipowners had relied on a current version of the relevant Canadian Hydrographic chart (Chart 7777) which did not note the shoal in question (a chart issued in 1997 and updated through Notices to Mariners to June, 2004).

While the Court rejected the shipowners' arguments, the decision sheds light on the process by which seafarers in Canadian waters are informed of unmarked shoals and known obstructions, and the duties of shipowners to exercise due diligence in properly updating their charts and their voyage preparations and planning.

The Crown acknowledged that the shoal had been detected in September 2007 (by another Canadian icebreaker on a scientific expedition in those waters) and was noted in a Notice to Shipping at that time – A102/07). While the Crown had yet (as of 2010 when the grounding occurred) to update the material Chart, the Court held that a prudent shipowner would not have relied solely on the Chart but would have ensured (as obliged under s. 7 of Canada's Charts and Nautical Publication Regulations, 1995) that all charts and related documents required by such Regulations, before being used for navigation, were correct and up to date by taking note of all relevant Notices to Shipping.

The Notice to Shipping was initially broadcast via radio for a fixed period of time before being issued in written form, available online, in late 2007 (co-incidentally, the Notice to Shipping was again broadcast by radio from July 1, 2010 to August 20, 2010). Although the process to upgrade the Notice to Shipping to a more formal (and internationally recognized) Notice to Mariners had begun in early 2010, it had not been approved for publicity at the time of the incident.

The facts accepted by the Court were to the effect that the shipowner failed to prudently check all available Notices to Shipping in preparing for the voyage through Coronation Gulf. As such Notices are available to shipowners on line, the trial judge was critical of the shipowners, managers and navigating officers in failing to properly search out such information when planning and executing the voyage north, given that the Chart clearly showed areas (water) that had not been surveyed. Of particular note was the finding of the Court that less than 10% of the vast Arctic waters had been surveyed to modern standards (para. 30), a fact the ship's managers and officers should have been aware of (particularly as the ship's Master had participated in 60 prior Arctic voyages).

### ***General Regulations and Guidelines***

#### **Arctic Shipping Safety and Pollution Prevention Regulations<sup>27</sup> (the "ASSPPR")**

Made under the Arctic Waters Pollution Prevention Act,<sup>28</sup> the ASSPPR establish safety, operational, and pollution prevention requirements for ships in Arctic waters.

While the ASSPPR do not impose the requirement of embarking a pilot in Arctic waters, they do require a qualified ice navigator in some situations:

*10 (1) Vessels, other than a cargo vessel of 500 gross tonnage or more or a passenger vessel that are certified as meeting the requirements of Chapter I of*

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<sup>27</sup> SOR/2017-286 [ASSPPR].

<sup>28</sup> R.S.C., 1985, c. A-12.

*SOLAS, that navigate in a shipping safety control zone set out in columns 2 to 17 of Schedule 1 during a period other than those set out in item 14 of that schedule must have an ice navigator on board.*

Indeed, the requirement to have an ice navigator (a master or deck watchkeeper who satisfies the minimum ice navigation experience or training requirements of s. 10(2) of the ASSPPR) only applies to passenger vessels not certified under Chapter I of SOLAS, which are generally small passenger vessels of less than 500 gross tonnage, and only for navigation outside the specified summer melt season for each arctic shipping safety control zone ("SSCZ").<sup>29</sup>

The SSCZs are illustrated in Figure 1, below.

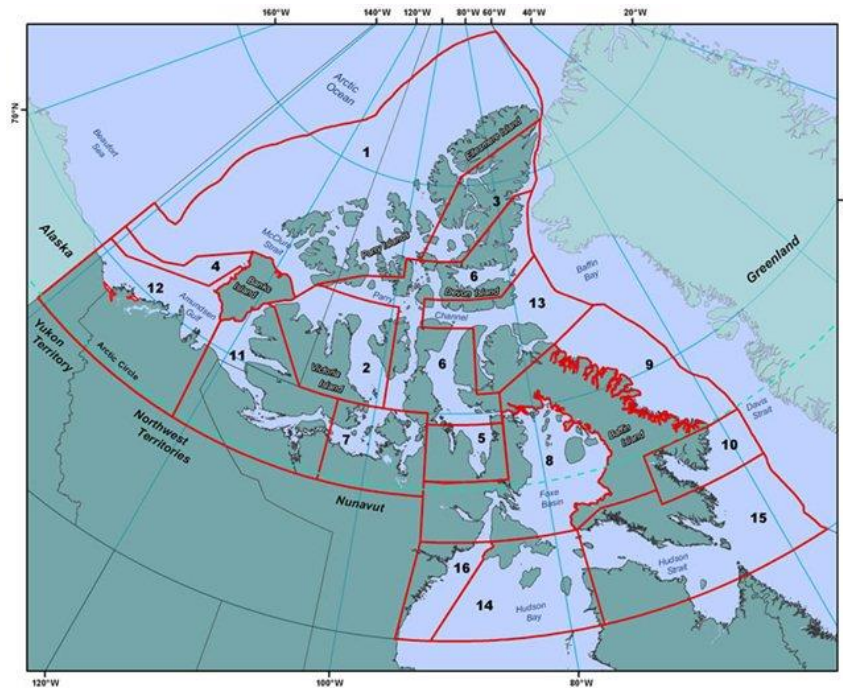


Figure 1: Transport Canada Map of Shipping Safety Control Zones<sup>30</sup>

For those vessels subject to SOLAS, s. 6 of the ASSPPR makes compliance with Chapter XIV of SOLAS<sup>31</sup> (the “Polar Code”, which does contain certain ice navigation qualification requirements at regulation 12.3) mandatory. Ice navigators must be qualified as follows, pursuant to s. 10(2) of the ASSPPR:

(2) *The ice navigator on a vessel must*

*a) have all of the qualifications under the Canada Shipping Act, 2001 to act as a master or a person in charge of the deck watch; and*

<sup>29</sup> See ASSPPR, *supra* note 27 at Schedule 1, row 14.

<sup>30</sup> See Canadian Coast Guard, *Ice Navigation in Canadian Waters* (Ottawa: Fisheries and Oceans Canada, 2012) at 18 <<https://www.ccg-gcc.gc.ca/publications/icebreaking-deglacage/ice-navigation-glaces/docs/ice-navigation-dans-les-galces-eng.pdf>> [Ice Navigation].

<sup>31</sup> Resolution MSC.385(94) (21 November 2014, effective 1 January 2017); Amendments to the International Convention for the Safety of Life at Sea 1974, Resolution MSC.386(94) (21 November 2014, effective 1 January 2017); International Code for Ships Operating in Polar Waters (Polar Code) Resolution MEPC.265(68) (15 May 2015, effective 1 January 2017); Amendments to MARPOL Annexes I, II, IV and V, Resolution MEPC.266(68) (15 May 2015, effective 1 January 2017); as consolidated at <<https://www.wcdn.imo.org/localresources/en/MediaCentre/HofTopics/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>> [Polar Code].

b) either:

(i) have served on a vessel in the capacity of master or person in charge of the deck watch for at least 50 days, of which 30 days must have been served in international Arctic waters while the vessel was in ice conditions that required the vessel to be assisted by an ice-breaker or that required manoeuvres to avoid concentrations of ice that might have endangered the vessel, or

(ii) hold a certificate in advanced training for ships operating in polar waters in accordance with regulation V/4 of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

In addition, the ASSPPR establish low air temperature requirements for Canadian vessels constructed in 2017 or later, including the assignment of a cold temperature service or winterization notation, a requirement for cold-weather-certified life rafts or other marine evacuation systems, and a requirement that engines and other systems of all lifeboats and rescue boats aboard can start and operate in cold weather.<sup>32</sup>

The ASSPPR also limit the authorized periods of navigation for certain classes or types of vessels in the different SSCZs, based on their ice capabilities.<sup>33</sup> In addition to the classification regime currently in force under the Canada Shipping Act, 2001<sup>34</sup> (the "CSA"), designated as "Canadian Arctic Class", the ASSPPR recognize ice classifications pursuant to the former Arctic regime under the Arctic Shipping Pollution Prevention Regulations<sup>35</sup>, foreign national regimes, and international regimes, such as the Polar Classes established by the International Association of Classification Societies and incorporated in the Polar Code.<sup>36</sup>

#### Navigation Safety Regulations, 2020<sup>37</sup> (the "NSR")

The NSR, made under the CSA, consolidate previous regulations and introduce new requirements relating to navigational safety, pollution prevention, and safety of life at sea.

Pursuant to s. 121(1)(c) of the NSR, "*Canadian vessels of more than 150 gross tonnage that are navigating in ice that might cause substantial damage to the vessel*" must be equipped with two searchlights for nighttime ice spotting. The NSR also set out the characteristics of the searchlights and the spare equipment that must be carried (see s.121(4), (5)).

Furthermore, pursuant to s. 142(1)(h), vessels of 100 gross tonnage or more that may encounter ice on their voyage are required to have a copy of the Coast Guard document *Ice Navigation in Canadian Waters* aboard.

#### Northern Canada Vessel Traffic Services Zone Regulations<sup>38</sup>

These regulations, also made under the CSA, establish a Vessel Traffic Services ("VTS") zone in Northern Canada. As illustrated in Figure 2, below, the VTS zone established by these regulations is slightly larger than that covered by the ASSPPR, as it includes some inland waterways in addition to the

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<sup>32</sup>See *ibid* at s. 11.

<sup>33</sup> See *ibid* at ss. 7, 8 and Schedule 1.

<sup>34</sup> S.C. 2001, c. 26.

<sup>35</sup> C.R.C., c. 353 (Repealed, SOR/2017-286, s. 34).

<sup>36</sup> See ASSPPR, *supra* note at s. 5 and Schedule 1.

<sup>37</sup> SOR/2020-216.

<sup>38</sup> SOR/2010-127.



SSCZs.<sup>39</sup> Ships over 300 gross tonnage navigating in the Northern Canada VTS zone must check in with VTS and file various reports indicating their position, status, and sailing intentions.<sup>40</sup>

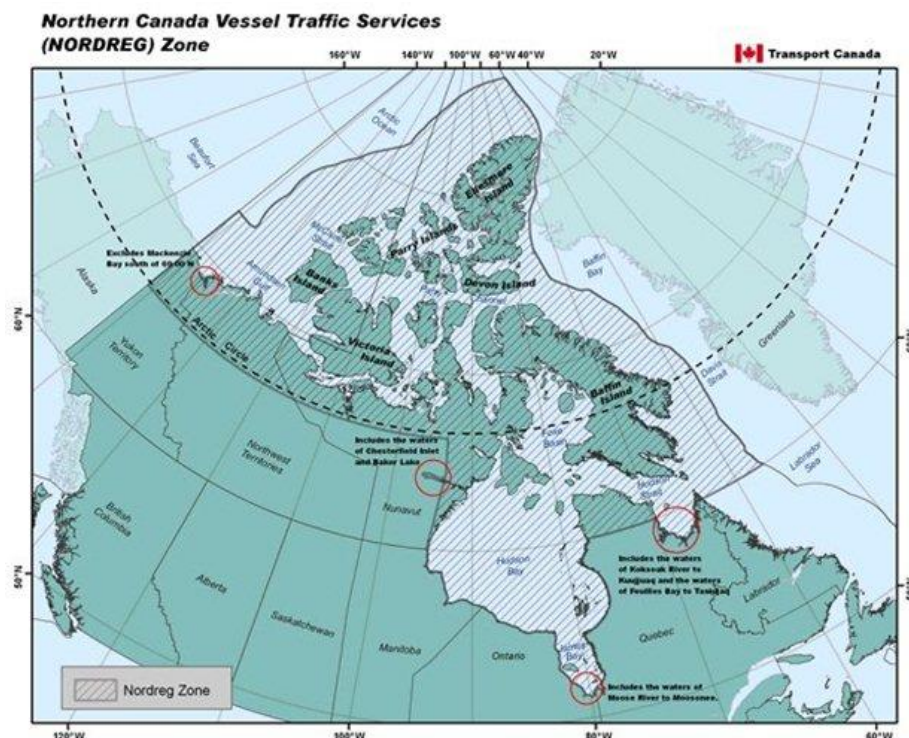


Figure 2: Transport Canada Map of the Northern Canada Vessel Traffic Services Zone<sup>41</sup>

#### Canadian Coast Guard, *Ice Navigation in Canadian Waters*<sup>42</sup>

This document is a guide for mariners navigating in ice in all Canadian waters, including the Arctic. While it is not mandatory, it contains useful information regarding ship construction, passage planning, and icebreaking services, inter alia, and it refers to other regulations and guidelines. As stated above, certain vessels in Canadian ice waters are required by the NSR to have a copy of *Ice Navigation in Canadian Waters* on board.

The intent of the document is described as follows:

*“The publication is intended to assist ships operating in ice in all Canadian waters, including the Arctic. This document will provide Masters and watchkeeping crew of vessels transiting Canadian ice-covered waters with the necessary understanding of the regulations, shipping support services, hazards and navigation techniques in ice”*.<sup>43</sup>

#### Transport Canada, *Guidelines for Passenger Vessels Operating in the Canadian Arctic*<sup>44</sup>

Like the preceding document, these guidelines are not mandatory but set out best practices for passenger ships conducting Arctic voyages. They refer to the various governmental agencies and stakeholders that

<sup>39</sup> See *ibid* at s. 2.

<sup>40</sup> See *ibid* at s. 3.

<sup>41</sup> See *Ice Navigation*, *supra* note 30 at 7.

<sup>42</sup> See *Ice Navigation*, *supra* note 30.

<sup>43</sup> See *ibid* at p. iii.

<sup>44</sup> TP 13670E.

may be engaged in the planning and execution of an Arctic voyage, as well as the various applicable laws and regulations. The intent of these guidelines is described as follows:

*These guidelines are intended to assist passenger vessel operators and DVR's with planning and achieving a successful voyage, in addition to promoting good relations with residents of Canada's Arctic. Specifically, these guidelines will assist the operator or DVR with making contact with all relevant authorities so that:*

- *All relevant publications and certificates are on board the vessel;*
- *Operators have studied the charts and read the publications prior to entering Canadian Arctic waters;*
- *The voyage complies with all applicable acts and regulations;*
- *The voyage adheres to land claim agreement provisions along the planned route; and*
- *That permission from land claim authorities and private property owners is sought and, where appropriate, access to these areas is granted.*<sup>45</sup>

#### Interaction with the Polar Code

In general, the safety provisions of the Polar Code are incorporated in the ASSPPR by reference and in case of inconsistency are trumped by Canadian law (which is often stricter, particularly in terms of pollution).<sup>46</sup> The implementation of the Polar Code in Canada has been described as “largely convergent on most issues, divergent on some specific issues (in the sense of retaining uniquely Canadian rules that are viewed as scaling up code expectations) and as extending the application of particular code rules to a wider range of vessels”.<sup>47</sup>

For instance, as explained above, the ASSPPR complete and extend the Polar Code provisions on training and certification of crew operating on ships in arctic waters, both by making the Polar Code's goal-oriented recommendations in regulation 12.3 mandatory and by adding ice navigator requirements for non-SOLAS vessels, which are not captured by the Polar Code.<sup>48</sup>

The overall result is a regulatory system for arctic shipping that embraces the objectives and provisions of the Polar Code while establishing requirements above and beyond those of the Polar Code to adapt them to the realities of Canada's arctic.

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<sup>45</sup>See *ibid* at p. IV.

<sup>46</sup> See ASSPPR, *supra* note at ss. 2(2), 6; see Aldo Chircop, Peter Pamel, and Miriam Czarski, Canada's Implementation of the Polar Code (2018) 24 JINL 428 at p. 445.

<sup>47</sup> See Chircop et. al. (2018), *supra* at p. 447.

<sup>48</sup> See ASSPPR, *supra* note at s. 10.

## **4. Description of the legislation in the relevant jurisdictions regarding passenger rights**

### **4.1 United States – Alaska<sup>49</sup>**

The United States is not a signatory to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974. Moreover, no U.S. legislation directly addresses the rights of passengers to compensation due to injury, delay, loss of luggage, voyage deviation or cancellation. With the exception of claims for wrongful death, the liability of carriers to passengers is governed by the general maritime law of the United States or state law, and the terms of the contract of carriage. The Death on the High Seas Act (“DOHSA”) applies to claims for wrongful death resulting from accidents occurring more than three miles from the U.S. coastline.

#### a. Basis of liability of the carrier (personal injury, fatalities, cancellation, delay and luggage)

##### Liability for Personal Injury

The liability of a passenger vessel operator to passengers who are injured aboard a vessel operating on navigable waters is governed by general maritime law negligence principles. The plaintiff must establish that the carrier had a legal duty to protect the plaintiff against the harm causing the injury, a breach of that duty, proximate cause between the breach and the harm, and actual harm. The carrier owes its passengers a legal duty to transport them safely and to exercise reasonable care under the circumstances of each case. This duty requires the carrier to use the reasonable care that an ordinarily prudent person would render under the circumstances. If the breach of this duty causes a passenger’s injuries, the vessel operator will be liable for the passenger’s resulting damages.

The carrier is vicariously liable for injuries caused by the negligence of its servants acting within the scope of their employment or in the discharge of special duties imposed on them. The liability for acts of employees extends to all members of the crew, and other agents of the carrier.

Common defenses to personal injury claims include that the passenger’s own negligence contributed to his injuries, that the injuries were the result of third parties, and that the passenger failed to mitigate her damages. In addition to these types of defenses, the carrier may also assert defenses based on provisions in its contract with the passenger, which are discussed in more detail below. Damages awarded for personal injury may include medical costs, lost past income, lost future earning capacity, and general damages such as pain and suffering, loss of consortium, and emotional distress.

If a passenger is injured on a shore-side excursion, such as while hiking to observe wildlife, their claim will be governed by Alaska law, unless the passenger contract contains a valid choice of law clause that specifies the application of another law.<sup>50</sup> The basic elements of a personal injury claim under Alaska law are the same as those under the maritime law (*i.e.* duty, breach of duty, causation and damages). The same defenses listed above are also available to the carrier. However, there are important differences between Alaska law and the maritime law. If Alaska law applies, an award of non-pecuniary damages is subject to a statutory cap. Defendants in a maritime claim are usually jointly and severally liable for any damages awarded, while under Alaska law each defendant is severally liable for only its share of the damages based on the percentage of fault allocated to it. The prevailing party in a lawsuit brought under Alaska law is entitled to an award of partial attorneys’ fees, while attorneys’ fees are not generally available in a suit brought under the maritime law.

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<sup>49</sup> Contributed by Bert Ray, Schwabe Williamson & Wyatt.

<sup>50</sup> Passenger contracts often have choice of law clauses that specify the law governing claims arising from injuries onshore. But in *Long v Holland Am. Line Westours*, 26 P.3d 430 (Alaska 2001) the Alaska Supreme Court held that Alaska’s statute of limitations applied to a claim arising from a land excursion despite a clause in the excursion contract calling for the application of Washington law to such claims.

### Liability for Wrongful Death.

The law governing a wrongful death claim involving a passenger depends on where and how the accident causing the death occurred. Regardless of which law applies, the proper claimant is the personal representative of the decedent's estate, who asserts claims on behalf of the estate and the decedent's survivors. The claimant must prove that the carrier's negligence was the proximate cause of the decedent's death. The defenses to personal injury claims discussed above are also available in wrongful death claims.

#### (i) Deaths on the High Seas.

The Death on the High Seas Act ("DOHSA")<sup>51</sup> applies to claims for wrongful death resulting from accidents occurring more than three miles from the U.S. shoreline.

DOHSA provides the exclusive remedy for the spouse, parents, children or dependent relatives of the decedents. For purposes of DOHSA, the "high seas" are waters more than three miles beyond the U.S. shoreline.

Under DOHSA, the personal representative of the estate pursues claims on behalf of the decedent's estate, as well as the decedent's spouse, parents, and children. Other relatives of the decedent, such as siblings or grandparents, may only recover if they can prove that they were financially dependent on the decedent.

A claimant in a DOHSA suit may only recover pecuniary losses as damages. Pecuniary damages include medical costs, burial costs, loss of financial support, and loss of inheritance. Non-pecuniary damages such as pre-death pain and suffering and emotional distress are not recoverable under DOHSA.

#### (ii) Deaths from Accidents Occurring Within Three Miles of U.S. Shoreline.

Claims for wrongful deaths resulting from accidents on vessels operating on navigable waters that occur within three miles of the U.S. shoreline are governed by the maritime law of the United States. Damages awarded under the general maritime law are more generous in that they include both pecuniary and non-pecuniary damages. Thus, in addition to the pecuniary damages recoverable in a suit governed by DOHSA, non-pecuniary damages such as pre-death pain and suffering and loss of consortium are recoverable.

Absent a choice of law clause calling for the application of another law, Alaska law would apply to a wrongful death claim arising from an accident that occurs while passengers are on a shore-side excursion in the arctic. As with the maritime law, Alaska law provides more generous damages to plaintiffs in wrongful death lawsuits than are recoverable under DOHSA. Claimants in such cases may recover both pecuniary and non-pecuniary damages under Alaska law. The important differences between Alaska law and the maritime law, discussed above in the context of personal injury claims, also apply to wrongful death claims.

### Enforceability of Contract Terms Limiting Carrier Liability and Governing Presentation of Claims.

Carriers frequently insert clauses in their passenger contracts that disclaim or limit their liability to passengers for injuries, losses and damages. U.S. law prohibits and invalidates some types of disclaimers of liability. Contract provisions that are not expressly prohibited by statute will be enforced if they are fundamentally fair, and clearly and timely communicated to the passenger.

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<sup>51</sup> 46 U.S.C. §30302.

(i) Clauses Disclaiming Liability for Carrier's Own Direct Negligence.

A federal statute prohibits carriers from including provisions in their passenger contracts that limit their liability for personal injury or death caused by their negligence.<sup>52</sup> Court decisions interpreting this statute have invalidated clauses that disclaim the carrier's direct liability arising from accidents due to the seaworthiness of the vessel,<sup>53</sup> accidents where the passenger is contributorily negligent,<sup>54</sup> injuries occurring while transiting between the vessel and shore,<sup>55</sup> injuries occurring as a result of the carrier's direct negligence while participating in recreational activities on the vessel or on shore,<sup>56</sup> or limiting the carrier's liability to a specified dollar amount.<sup>57</sup>

However, the statute allows carriers to insert provisions in their contracts that relieve them from claims for emotional distress, mental suffering, and psychological injuries, as long as those conditions are not the result of physical injury to the claimant, the result of the claimant having been at actual risk of physical injury, or having been intentionally inflicted by the carrier. Thus, clauses disclaiming liability for emotional distress from other causes, such as witnessing another passenger's death or injury, are valid and enforceable.

(ii) Clauses Disclaiming Liability for the Negligence of Independent Contractors.

Third party contractors often provide services to passengers such as shore-side transportation, lodging and transportation, and onboard recreation, spas and medical treatment. Often, the carrier promotes such excursions, arranges bookings with the third-party contractors, and receives compensation for doing so. Cruise contracts typically contain clauses that disclaim any responsibility for accidents or injuries resulting from the negligence of such third party contractors. Courts have generally held that such provisions are enforceable against claims that the carrier is vicariously liable for the negligence of such third parties.<sup>58</sup> But they do not relieve the carrier of liability for its own direct negligence involving the selection and vetting of third party contractors by the carrier, or for failing to warn passengers of known risks associated with dangerous excursions and activities promoted by the carrier.<sup>59</sup>

(iii) Clauses Limiting Liability for Lost or Damaged Property.

Federal law provides that a vessel operator is not liable as a carrier for the loss of valuable items such as precious metals, jewelry, money, and securities packed in luggage if the passenger fails to disclose in writing the value of these items.<sup>60</sup> Many cruise contracts prohibit passengers from stowing valuable items in their luggage, and disclaim liability for the loss or damage of such items stowed in luggage. Cruise contracts also commonly limit the carrier's liability for lost or damaged property, such as luggage, to a nominal amount. Some operators permit passengers to pay a fee in order to declare a higher value for the luggage.

(iv) Clauses Limiting Liability for Cancellation, Termination or Delay of Cruise.

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<sup>52</sup> 46 U.S.C. §30509(a).

<sup>53</sup> *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1985 A.M.C. 826, (11th Cir. 1984), cert. denied, 470 U.S. 1004, 105 S. Ct. 1357, 84 L. Ed. 2d 379, 1985 A.M.C. 2397 (1985).

<sup>54</sup> *Hawthorne v. Holland-America Line*, 160 F. Supp. 836, 1958 U.S. Dist. LEXIS 2568 (D. Mass. 1958).

<sup>55</sup> *Lawlor v. Incres Nassau S.S. Line, Inc.*, 161 F. Supp. 764, 1958 U.S. Dist. LEXIS 3355 (D. Mass. 1958)

<sup>56</sup> *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 2011 A.M.C. 2941, 2011 U.S. Dist. LEXIS 62446 (S.D. Fla. 2011); *Johnson v. Royal Caribbean Cruises, LTD.*, 449 Fed. Appx. 846, 2011 U.S. App. LEXIS 25240 (11th Cir. 2011).

<sup>57</sup> *Rosenthal v. Compagnie Generale Transatlantique*, 14 F.R.D. 33, 1953 U.S. Dist. LEXIS 3755 (D.N.Y. 1953)

<sup>58</sup> *Henderson v. Carnival Corp.*, 125 F. Supp. 2d 1375, 1377 (S.D. Fla. 2000); *Mashburn v. Royal Caribbean Cruises, Ltd.*, 55 F. Supp. 2d 1367, 1370 (S.D. Fla. 1999); *Dubret v. Holland Am. Line Westours, Inc.*, 25 F.Supp.2d, 1151, 1153 (W.D. Wash. 1998).

<sup>59</sup> *Zapata v. Royal Caribbean Cruises, Ltd.*, No. 12-21897-Civ, 2013 WL 1296298, at 1 (S.D. Fla. Mar. 27, 2013); *Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 2011 AMC 2941 (S.D. Fla. 2011)

<sup>60</sup> 46 U.S.C. §30503.

No federal statutes directly address the liability of a carrier for cancelling, delaying, or prematurely terminating a cruise. The Cruise Lines International Association (“CLIA”) has adopted an International Cruise Line Passenger Bill of Rights that specifies the rights of passengers to receive refunds when a cruise is terminated or cancelled due to mechanical failures.<sup>61</sup> The Bill of Rights also provides that passengers are entitled to timely notices of changes in cruise itineraries, and the right to transportation to the ship’s intended port of disembarkation or the passenger’s home city if the cruise is terminated early, the right to lodging if a cruise is terminated early. Passenger contracts of cruise operators that are members of CLIA are required to contain clauses consistent with these provisions, and frequently contain other clauses that address the right to partial refunds when a cruise is terminated early. Not all cruise operators are members of CLIA, and their liability for cruise cancellations, deviations and terminations would be governed the terms of their passenger contracts and the general maritime law.

(v) Notice and Time to Sue Clauses.

A federal statute prohibits carriers from inserting clauses in passenger contracts that require passengers to give the carrier less than six months’ notice of a claim for personal injury or death.<sup>62</sup> The same statute prohibits clauses that require that a lawsuit be filed earlier than one year after the date of the injury or death.

Ordinarily, the statute of limitations for claims for personal injury or death for maritime claims is three years. However, courts have held valid and enforced provisions in passenger contracts that specify shorter time limits for bringing claims or giving notice of injuries, as long as they do not violate this statute.<sup>63</sup>

b. Limitation of Liability

The United States is not a signatory to international conventions on limitation of liability. Under United States law, the Shipowner’s Limitation of Liability Act provides that the liability of an owner of a vessel for claims arising during a voyage shall be limited to value of the vessel at the end of the voyage plus any pending freight.<sup>64</sup> However, when the limit of a vessel owner’s liability is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than \$420 per ton of the vessel, that portion must be increased to \$420 per gross ton of the vessel.<sup>65</sup> An owner’s right to limitation of liability under the U.S. statute will be lost if claimant proves that the causes of the accident or injury were within the owner’s privity and knowledge.

c. Jurisdiction options (forum)

Most passenger contracts contain forum selection clauses that require passengers to bring their claims against the carrier in a specific location. Typically, the specified location is the city or county where the carrier has its U.S. base of operations. Such clauses are generally enforceable if they are conspicuous and provided to the passenger at the time of booking.<sup>66</sup>

A federal statute prohibits a carrier from inserting an arbitration clause in a passenger contract that limits the right of a claimant for personal injury or death from a trial by a court of competent jurisdiction.<sup>67</sup> This clause would seem to prohibit a clause that requires the arbitration of claims for personal injury or death.

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<sup>61</sup> <https://cruising.org/en/about-the-industry/policy-priorities/cruise-industry-policies/Other>.

<sup>62</sup> 46 U.S.C. §30508.

<sup>63</sup> *Hughes v Carnival Cruise Lines*, 2003 U.S. Dist. LEXIS 5065 (S.D.N.Y. 2003).

<sup>64</sup> 46 U.S.C. §30505.

<sup>65</sup> 46 U.S.C. §30506.

<sup>66</sup> *Carnival Cruise Lines v Shute*, 499 U.S. 585 (1991).

<sup>67</sup> 46 U.S.C. 30509(a)(1)(B).

#### d. Contracting and actual carriers and tour operators

No information available

#### e. Insurance requirements

There are no federal or state regulations that require cruise operators to carry any specified limits of insurance to cover claims by passengers.

Both federal and Alaska law require carriers to demonstrate financial responsibility to respond to an oil spill from their vessel.<sup>68</sup> Both federal law and Alaska law allow the carrier to demonstrate financial responsibility using proof of insurance. However, carriers can use other means to prove financial responsibility such as self-insurance, guarantees, and letters of credit, bonds.

#### f. Package Travel Regulations

N/A

#### g. Special features

N/A

### **4.2 Norway<sup>69</sup>**

#### EU Regulation 392/2009 - The Athens Convention 2002

Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents (the “Athens Regulation”), effectively implements the Athens Convention 2002<sup>70</sup> as a part of EU/EEA law (except the provisions regarding jurisdiction issues that were deemed covered by the Brussels regulation) and thus applies in Norway.<sup>71</sup> The regulation and the convention are further implemented in Norwegian law through the Maritime Act § 418. It is mandatory.

The Athens Convention 2002’s primary scope is International transport but is also relevant to domestic transport if the ship is flying a Member State’s flag or is registered in a Member State, if the parties have entered into the contract in a Member State, or if the departure or arrival port is located in a Member State.<sup>72</sup>

The Convention generally applies to economic damages (not punitive or exemplary damages).<sup>73</sup>

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<sup>68</sup> 33 U.S.C. §2716; A.S. 46.04.040.

<sup>69</sup> Contributed by Lars Rosenberg Overby, partner IUNO Law Firm and Kjersti Tusvik, Officer EFTA internal market division.

<sup>70</sup> See the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002 protocol.

<sup>71</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>72</sup> Athens Convention Article 2.

<sup>73</sup> Athens Convention Article 3 (5) (d).

#### a. Basis of liability of the carrier (personal injury, fatalities, cancellation, delay and luggage)

##### Personal injury and death

The liability of the carrier is regulated in the Athens Convention 2002 article 3. In the case of a shipping incident<sup>74</sup> that causes death or personal injury, the carrier is strictly liable for losses of up to SDR 250,000, and each incident is counted individually. The convention offers two exceptions from this rule. Firstly, the carrier is exempted from liability if the incident was caused by a force majeure event, such as acts of war or natural disasters. Secondly, the carrier is also exempted from liability in case the event was “wholly caused by an act or omission done with the intent to cause the incident by a third party”.

Furthermore, if the loss exceeds SDR 250,000, the carrier may be exempted from compensating the excess loss by proving that the loss occurred without fault or negligence on the carrier or someone for whom the carrier is responsible.

If the death or injury was not caused by a shipping incident, the carrier is liable, unless it can prove that the loss occurred without fault or negligence. The burden of proof is with the claimant. Finally, the carrier may be wholly or partly exonerated from liability in the event of contributory fault.<sup>75</sup>

Consequently, the Convention operates with three different liability regimes.

##### Advance payments

The Athens Regulation has a special feature which the Convention does not have and this is that in case of a shipping incident, the passenger or – in the case of the passenger’s death – the dependents are entitled to an advantage payment which is only refundable in special circumstances.<sup>76</sup>

##### Damage or loss to luggage

Similarly, the carrier is liable for damage to cabin luggage<sup>77</sup> due to fault or neglect, and in case of damage resulting from a shipping incident, the Athens convention states that it is presumed that the damage was caused by the carrier. For other luggage<sup>78</sup>, the carrier is liable unless it can prove that the loss occurred without fault or negligence. The liability for loss or damage to hand luggage is limited to SDR 2,250, and for other luggage (except vehicles) to SDR 3,375 per passenger per carriage.<sup>79</sup>

##### Time bar

The time-bar for actions under the Athens Convention 2002 is two years, and there is a final deadline of five years.<sup>80</sup>

EU Regulation 1177/2010 has no specific rules with regards to limitation period, and the general rule of three years will apply, cf. the Norwegian Limitation Act § 2.<sup>81</sup>

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<sup>74</sup> Defined in article 3 (5) (a) as «shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship».

<sup>75</sup> Article 6.

<sup>76</sup> Athens Regulation article 6.

<sup>77</sup> Definition of cabin luggage in the Athens convention article 1 (6): «luggage which the passenger has in his cabin or is otherwise in his possession, custody or control».

<sup>78</sup> The definition of luggage is set out in article 1 (5).

<sup>79</sup> Articles 8 (2) and (3).

<sup>80</sup> Article 16.

<sup>81</sup> Under EU Regulation 261/2004, the European Court of Justice decided that a claim under the compensation scheme may be time-barred in accordance with national regulations (C-139/11). The Air Passenger Complaint Handling Board later concluded that the two-year limitation period in the Aviation Act did not apply, but rather



## b. Limitation of liability

In case of death or personal damage, the liability is in any case limited to SDR 400,000 per passenger on each distinct occasion<sup>82</sup>. This right to limit liability is lost if “*it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result*”.<sup>83</sup>

Further, chapter 9 of the Maritime Act on global limitation of liability (the 1976 London Convention as amended by the 2002 protocol) applies and the carriers may limit their liability in accordance with these rules.

## c. Jurisdiction options (forum)

Whilst the Athens Regulation applies in Norway, the regulation notably does not incorporate articles 17 of the Athens Convention 2002 on jurisdiction. Instead, the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters possibly applies.<sup>84</sup> In the event of a claim due to death, personal damage or damage to luggage, the claimant may hence commence proceedings at the competent jurisdiction in accordance with the said Lugano Convention articles 5 (1) concerning the place where contractual obligations are to be fulfilled and 5 (3) regarding the place where a tort was committed. If the convention does not apply, then the general rules on jurisdiction as set out in the Civil Procedure Act<sup>85</sup> apply, and it is submitted that the same jurisdictions will be available to the claimant passenger.

Whilst jurisdiction agreements are not permitted by the 2002 Athens Convention, the fact that article 17 is not carried over in the Athens Regulation seems to infer that jurisdiction agreements in passenger tickets would be enforceable. That said, if such an agreement directs a jurisdiction different from that or those involved in the voyage and place the passenger in an unfavourable position compared to the law that would otherwise apply, then such an agreement will be void.<sup>86</sup>

In Norway, the Maritime Passenger Complaint Handling Body hears complaints under Regulation 1177/2010<sup>87</sup>. The hearing is free of charge for the passenger.

Actions regarding delay under the Maritime Act may be heard by Courts of a) the defendant’s permanent principal residence or principal place of business, b) at the place of departure or destination pursuant to the contract of carriage, c) in the State of the claimant’s place of residence, provided that the defendant has a place of business in that State or may be sued there, or d) in the State where the contract of carriage was entered into, provided that the defendant has a place of business in that State and may be sued there.<sup>88</sup>

In the event of Svalbard being the legal venue of a court case, these cases will be heard at Nord-Troms District Court in Tromsø and Hålogaland Court of Appeal, also located in Tromsø.

## d. Contracting and performing carriers and tour operators

The Athens Convention identifies the party concluding the contract of carriage as the *carrier* cf. articles 1(1) a) and 3. This could be a tour operator as well as the shipowner. However, the convention also

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the general rule under the Limitation Act. A similar approach can be used when interpreting EU Regulation 1177/2010 and the Maritime Act vs. the Limitation Act.

<sup>82</sup> Article 7.

<sup>83</sup> Article 13(1).

<sup>84</sup> EUR-Lex - 41988A0592 - EN - EUR-Lex (europa.eu).

<sup>85</sup> Lov om mekling og rettergang i sivile tvister (tvisteloven) LOV-2005-06-17-90.

<sup>86</sup> See article 3 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>87</sup> www.reiselivsforum.no.

<sup>88</sup> The Maritime Act, Section 429.

provides that actual carriers are responsible for the part of the voyage that they perform (see articles 1 (1) b) and 4).

#### e. Insurance requirements

The Athens Convention article 4a sets out insurance requirements in order to ensure solvency in the event of casualties or injury to a passenger. Article 4a sets out particularly detailed insurance requirements for the carriers that fall within the scope of the Convention. Any carrier that performs part of or the whole carriage under the Athens Convention shall provide bank financial security of at least SDR 250,000 per passenger on each distinct incident. There are further requirements regarding the insurance certification, i.e. language requirements.

In addition, section 182a of the Maritime Code provides that shipowners of vessels larger than 300 gt must hold mandatory liability insurance up to the limits set out in the 1976 London Convention; including the 1996 amendments cf. the EU directive 2009/20 on the insurance of shipowners for maritime claims.<sup>89</sup> The limits are aligned with the Athens Convention 2002.

#### f. Package Travel Regulations

Norway has implemented the Directive (EU) 2015/2302 on package travel in the Package Travel Act of 2018. The Package Travel Directive seeks a high protection level for the travellers of package travels, and less favourable conditions for the traveller may not be agreed upon between traveller and provider. A package travel must consist of two or more travel services. Even if a cruise journey is not purchased together with e.g. plane tickets or hotel stays, it is highly likely that a cruise will be considered a package travel, as it includes transportation, accommodation and other travel services. According to the Package Travel Act Section 1, the regulation applies not only for Norwegian tour operators, but also for foreign tour operators and resellers that market and target their business towards travellers in Norway.

In case of a cancellation by the organiser prior to the start of the package, the Package Travel Act requires the organiser to offer the traveller a full refund, even if the cancellation was due to extraordinary and unavoidable circumstances. A force majeure event does, however, limit the organisers liability in terms of additional refunds, such as connecting plane tickets etc.

Regarding the performance of the package, the organiser is responsible when the package has not been executed in accordance with the package travel contract. In such an event, a list of remedies will be relevant, such as full or partial refunds, transportation assistance or additional compensation.

An organiser, who markets and offers package tours to the Norwegian market, is obligated to provide insolvency protection. A bank guarantee must be provided. In Norway, this is managed through the Travel Guarantee Fund. In case of an organiser's insolvency, the Travel Guarantee Fund will cover the travellers' loss if the package tour has not yet started, and if the travellers are at their destination, they will receive assistance from the Travel Guarantee Fund. An organiser is, however, not obligated to provide insolvency protection through the Norwegian scheme, if it can prove that sufficient insolvency protection has been provided in another EU member state. The latter does however not apply in Svalbard.<sup>90</sup>

The Package Travel Act has no specific rules with regards to limitation period, and the general rule of three years will apply, cf. Limitation Act § 2.

Provided the organiser is registered in the Norwegian Travel Guarantee Fund, the traveller may also have any dispute heard by the Package Travel Dispute Resolution Board in accordance with the Package Travel Act Section 50. Both parties may request dispute resolution by the Board, and the hearing is free

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<sup>89</sup> EUR-Lex - 32009L0020 - EN - EUR-Lex (europa.eu).

<sup>90</sup> The Svalbard Tourism Regulation Section 4.

of charge for the consumer. In the event of a lawsuit, the regulations are set out in the Civil Procedural Act. If the lawsuit is considered international, Norwegian courts may only hear the case if it has an adequate affiliation to the country of Norway.

#### g. Special features

##### Delay compensation under the Maritime Act

According to the Norwegian Maritime Act Section 418 e, the carrier is liable for loss in case of a passenger's delay caused by fault or negligence. The same rule applies for luggage under Section 419, the definition and treatment of cabin luggage and luggage is similar to that under the Athens convention. Proven contributory negligence may lead to reduced liability for the carrier. The liability is limited to SDR 4,150 when a passenger is delayed, SDR 1,800 for hand luggage, SDR 10,000 for vehicles and SDR 2,700 for other luggage<sup>91</sup>. A claim under the Maritime Act will be time-barred two years after the passenger landed or the luggage was delivered, cf. Section 501 (1) 6). The Maritime Act does not set out any insurance requirements for the carriers.

##### EU Maritime Passenger Rights regarding i.a. delay and cancellation

Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 is implemented in Norwegian Law through the Maritime Act section 418a. Further provisions related to passenger rights are given in the Maritime Act section 418b to 428.

The EU Regulation 1177/2010 on concerning the rights of passengers when travelling by sea and inland waterway seeks to ensure a "high level of protection for passengers [...]".<sup>92</sup> The regulation is mandatory<sup>93</sup>, and applies in the following situations, according to Article 2:

“(a) on passenger services where the port of embarkation is situated in the territory of Member State;

(b) on passenger services where the port of embarkation is situated outside the territory of a Member State and the port of disembarkation is situated in the territory of a Member State, provided that the service is operated by a Union carrier [...];

(c) on a cruise where the port of embarkation is situated in the territory of a Member State”.

Although the above-mentioned cruises fall within the scope of EU 1177/2010, cruise carriers are exempted from some of the obligations set out in chapter III of the regulation.<sup>94</sup>

Furthermore, ships certified to carry a maximum of twelve passengers are exempted, as well as routes of less than 500 meters one way, excursion or sightseeing tours other than cruises<sup>95</sup>, or travel by certain non-mechanical or historic ships.

In the event of a delay or a cancellation, chapter III sets out a series of obligations for the carriers. The passenger is entitled to information about the delay or cancellation, as well as information about alternative connections in case of a missed connection.<sup>96</sup> Under set premises, the passenger is also

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<sup>91</sup> The Maritime Act Section 422.

<sup>92</sup> EU 1177/2010 preamble (1).

<sup>93</sup> EU 1177/2010 Article 6.

<sup>94</sup> Article 16 (2) on the information in case of a missed connection, article 18 on re-routing and reimbursement in the event of cancelled or delayed departures, compensation of the ticket price in the event of delay in arrival, as well as article 20 (1) and (4), which provides exceptions from article 17, 18 and 19 and article 19 respectively

<sup>95</sup> A cruise in 1177/2010 is defined as transport operated “exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board”.

<sup>96</sup> EU 1177/2010 Article 16 (1) and (2).

entitled to assistance such as refreshments, meals and accommodation in accordance with Article 17 of the Regulation. In case of cancellation or a delay of more than 90 minutes, the passenger may choose between a re-routing at no additional cost or a reimbursement of the ticket price.<sup>97</sup> Article 19 creates a compensation scheme where 25 per cent of the ticket price shall be refunded in case of lengthy delays, calculated based on the duration of the voyage. The compensation may increase to 50 per cent of the ticket price in the event of delays twice the length or more than the timeframes set out in the provision.

Article 20 sets out a list of exceptions to the carrier's obligations. Passengers who hold a travel pass or a season ticket are not covered by the rights set out in Articles 17, 18 and 19. If the passenger was informed about the cancellation or delay prior to the ticket purchase, they are not entitled to the services set out in Article 17 nor compensation under Article 19. Furthermore, the passenger will not be entitled to accommodation in case the cancellation or delay is "caused by weather conditions endangering the safe operations of the ship".

The carrier is exempted from its liability under Article 19 in the event of such weather conditions as mentioned above, or when the cancellation or delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Section 17 of the 1177/2010 preamble lists certain situations that must be considered such extraordinary circumstances; however, the list should not be considered exhaustive.

#### High level of consumer protection – exemplified

Firstly, the European Union law provides a particularly high level of consumer protection. While it is pointed out in the Athens Convention preamble (1), that it is "important to ensure a proper level of compensation for passengers involved in maritime accidents", EU Regulation 1177/2010 seeks to ensure a "high level of protection for passengers". The Package Travel Act also seems to be the object of strict interpretation.

The Package Travel Dispute Resolution Board heard a case regarding a cruise organised by Hurtigruten in June 2019.<sup>98</sup> The traveller had purchased a voyage around Svalbard, which also included the eastern coast, which is normally not included in traditional Svalbard cruise itinerary. The chances of polar bear encounters are greater on the eastern side, which was the reason the traveller had purchased this particular cruise.

After two days on board, the passengers were informed that the trip could not be performed according to contract, as the ice conditions rendered the original itinerary impossible. The passenger was offered a voyage along the west coast, similar to most other Svalbard cruises. Hurtigruten had informed the passengers that there may be changes to the itinerary, but the traveller argued that the journey he received was a completely different travel, and that he was "trapped" on board with no opportunity to cancel the rest of the cruise. Hurtigruten offered the passenger a 60 per cent refund of the total price, an offer the traveller did not accept, as he claimed a 100 per cent refund, as well as a refund of his connecting train and airplane tickets.

The majority of the five members of the Package Travel Dispute Resolution Board concluded that the traveller had the right to a full refund of his purchase. It was not disputed that the carrier had not been able to deliver according to contract, and it was also documented that July was the earliest month journeys around Svalbard had been successfully completed in the last five years. The Board pointed out that the carrier had not made the vast risks of changes clear in their marketing and criticized the carrier for having waited until two days into the cruise before informing the passengers on the new itinerary. Thus, the above case serves as an example on the high consumer protection level of the EU law implemented in Norway, as well as the strict application of passenger rights.

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<sup>97</sup> Article 18 (1).

<sup>98</sup> PRKN-2019-3733.

### 4.3 Greenland (Denmark)<sup>99</sup>

The laws of Greenland and Denmark as such are two different regimes. Danish law is identical to Norwegian law (except as regards the Svalbard particularities) so reference is made to section 4.2 above. However, as mentioned above Greenland is not a member of the EU and regulates certain matters itself. In this context the laws of Greenland provide the mandatory<sup>100</sup> legal position set out below.<sup>101</sup> As can be seen The Merchant Shipping Act (the “MSA”) is modelled on the 1974 Athens Convention<sup>102</sup> but the limits are higher.<sup>103</sup>

#### a. Basis of liability of the carrier (personal injury, fatalities, cancellation, delay and luggage)

Section 401 of the MSA defines the *carrier* as a party that – commercially or for consideration – concludes a contract of carriage of passengers or luggage by ship. Such carrier is liable for personal injury or death and loss or damage to luggage on a negligence basis, but if the loss is caused by shipwreck, collision, stranding, explosion or fire the burden of proof is reversed in favour of the passenger (section 418). The claimant (i.e. the passenger or dependents) remains responsible for proving the extent of the loss.

#### b. Limitation of liability

According to section 422 of the MSA the carrier is entitled to limit its liability for the abovementioned losses to SDR 175.000 for personal injury or death and SDR 4.150 for delay. The limitation amount for hand luggage is SDR 1.800, SDR 6.750 for valuables<sup>104</sup>, SDR 10.000 for vehicles and SDR 2.700 for other luggage. These amounts are exclusive of interest and costs. Section 423 allows the carrier to deduct certain small amounts from the compensation as a kind of retention which is designed to exclude minor losses. The right to limit liability may be lost if the loss or damage is caused intentionally or by gross negligence with knowledge that such damage would probably result (section 424).

In addition, the carrier may rely on the 1976 London Convention on limitation of liability for Maritime Claims as implemented in the laws of Greenland which means SDR 175.000 multiplied with the number of passengers that the vessel is certified to carry (section 175 (1)). Accordingly, the limitation amounts are aligned.

#### c. Jurisdiction options (forum)

Section 429 contains rules about jurisdiction that dictate the following exclusive jurisdictions: 1) at the respondents domicile and 2) the courts at the agreed place of departure or destination. The parties may however agree on another jurisdiction provided that such agreement is made after the dispute has arisen. These rules are subordinated to the so-called EU Brussels regulation.<sup>105</sup> This entails complicated legal issues with respect to jurisdiction clause that directs disputes to other jurisdictions than the ones specified in the MSA because such agreements are valid as a starting point if the terms of article 25 of the EU Brussels regulation. That said such jurisdictions agreements may in the circumstances be set aside by virtue of the EU unfair consumer contracts directive article 3 as incorporated in Greenlandish law about consumer contracts.<sup>106</sup> This article 3 provides

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<sup>99</sup> Contributed by Lars Rosenberg Overby, partner IUNO Law Firm.

<sup>100</sup> For details see section 430.

<sup>101</sup> See Søløven act no.856 of 2010-07-01, (the Merchant Shipping Act), chapter 15.

<sup>102</sup> See the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea

<sup>103</sup> The said act reflects the former legal position in Danish law as described in Falkanger, Bull & Rosenberg Overby: Introduktion til søretten (1996).

<sup>104</sup> As defined in section 419 (2).

<sup>105</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>106</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

*“1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*

*2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”*

It is submitted that a jurisdiction clause that refers disputes to a jurisdiction other than the one specified by the MSA which has no connection to the contract of carriage in question or the passenger's domicile is likely to be set aside.

#### d. Insurance requirements for the carriers

Chapter 15 of the MSA regarding passengers does not contain any rules about insurance requirements and the MSA does not contain rules similar to the Danish MSA that both provides specific passenger liability insurance cover and general EU-law based insurance requirements.<sup>107</sup>

#### e. Contracting and actual carriers and tour operators

The above sets out the liability of the (contracting) carrier and a tour operator often qualifies as such. Section 426 (1) provides that this carrier remains liable towards the passengers even if the voyage is performed by someone else. The performing carrier is liable for part of the voyage that it performs and on the same basis as the contracting carrier (section 426 (2)). Section 426 (3) provides that the contracting and the performing carrier are jointly liable.

#### f. Package travel special rules (EU/EEA)

Whilst these rules (as described above in the Norwegian section) apply in Denmark, they have not been enacted for Greenland.

#### g. Special features

The fact that Greenland's MSA contains the rules which formerly applied in Danish law with the update that the EU Athens regulation introduced appears to be an oversight. In particular the apparent non-existing insurance requirements (which likely is less relevant in practice because tour operators and shipowners presumably do not engage in Arctic trade without insurance cover).

Consumer protection is a strong feature in Danish law and will work in favour of the passengers in case of doubt with respect to interpretation of legal instruments and disputes regarding the terms of carriage. For Greenland it should be noted that the Consumer Contracts Act also applies to transportation of passengers (except as regards the information requirements).<sup>108</sup>

### **4.4 Russian Federation<sup>109</sup>**

Modern Russian legislation does not contain special rules governing passenger navigation in the high North, and the norms of civil legislation and the Merchant Shipping Code contain only general rules for

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<sup>107</sup> See Directive 2009/20/EC 1 of the European Parliament and of the Council on the insurance of shipowners for maritime claims.

<sup>108</sup> See Anordning nr. 989 af 2011-10-14 om ikrafttræden for Grønland af lov om visse forbrugerftaler.

<sup>109</sup> Contributed by Alexander Skaridov, Professor St. Petersburg Maritime University, Head International and Maritime law Chair.

the relationship between a passenger and a carrier, without taking into account the specifics of polar shipping.

#### Scope of passengers' rights when traveling to the Polar areas

The scope of the rights of passengers and tourists when traveling to the Arctic/Antarctic by sea is no different from travel to other regions. There are no regulations in Russia that additionally regulate the conditions of travel to the Arctic. On a general basis, the norms of the Civil Code, the Federal Law "On the Basics of Tourist Activity", the Law "On Protection of Consumer Rights", as well as the regulations accepted by Maritime Commercial Code (MCC) with regard to the carriage of passengers by sea are applied. There is no specialized legislation at the federal level. At the local level, some regions have specialized "Arctic" legislation, but it boils down to the concept of zone development, policy priorities, etc. The rights and obligations of passengers are not affected by them.

#### Areas with intensive tourism (municipal regulations)

Local governments have the right, in order to implement favorable conditions for the development of tourism:

- to implement measures to develop priority areas of tourism development in the territories of municipalities, including social tourism, children's tourism and amateur tourism;
- to promote the creation of favorable conditions for the unhindered access of tourists (excursionists) to tourist resources located in the territories of municipalities, and communication facilities, as well as to receive medical, legal and other types of emergency assistance;
- organize and conduct events in the field of tourism at the municipal level;
- to participate in the organization and conduct of international events in the field of tourism, events in the field of tourism at the all-Russian, inter-regional, regional and inter-municipal level;
- to assist in the creation and operation of tourist information centers in the territories of municipalities.

An example is the Murmansk region - in the region there was a program of socio-economic development "Murmansk region - the strategic center of the Arctic zone of the Russian Federation" (Program formally was finished in 2020, but will be continued). The emphasis in the program was made on the development of tourism by attracting entrepreneurship to the region.

In the Arkhangelsk region there is a regional law "On tourism and tourist activities in the Arkhangelsk region". In particular, tourism is recognized as a priority area for the region's economy. Arctic tourism stands out as one of the promising areas for development. The document mainly contains the powers of local authorities in the field of tourism development. The rights of a tourist are not separately spelled out, everything that is not regulated in this document is a reference to federal legislation.

#### a. Carrier liability (personal injury, accidents, cancellation, delay and baggage)

Agreements of transport organizations with passengers and cargo owners on the limitation or elimination of the carrier's liability established by law are invalid, except in cases where the possibility of such agreements for the carriage of goods is provided for by transport charters and codes.

#### Delay

For a delay in the departure of a vessel carrying a passenger, or late arrival at the destination, the carrier shall pay the passenger a fine in the amount established by the relevant transport charter or code, unless it proves that the delay took place due to force majeure, elimination of vessel malfunction, threatening the life and health of passengers, or other circumstances beyond the control of the carrier.

In the event of a passenger's refusal of carriage due to a delay in the departure of the vessel, the carrier is obliged to return the carriage charge to the passenger.

### Baggage

The carrier is liable for the failure to preserve the cargo or baggage that occurred after it was accepted for carriage and before it was handed over to the consignee, the person authorized by him or the person entitled to receive baggage, unless he proves that the loss, shortage or damage of the cargo or baggage occurred due to circumstances which the carrier could not prevent and the elimination of which did not depend on him.

Damage caused during the carriage of cargo or baggage is compensated by the carrier:  
in case of loss or shortage of cargo or baggage - in the amount of the value of the lost or missing cargo or baggage;

- in case of damage (spoilage) of cargo or baggage - in the amount by which its value has decreased, and if it is impossible to restore the damaged cargo or baggage - in the amount of its value;
- in case of loss of cargo or baggage handed over for carriage with the declaration of its value in the amount of the declared value of the cargo or baggage.

The cost of cargo or baggage is determined based on its price indicated in the seller's invoice or provided for by the contract, and in the absence of an invoice or price indication in the contract, based on the price that, under comparable circumstances, is usually charged for similar goods.

The carrier, along with compensation for the established damage caused by loss, shortage or damage (spoilage) of cargo or baggage, returns to the sender (recipient) the carriage charge collected for the carriage of lost, missing, spoiled or damaged cargo or baggage, if this fee is not included in the cost of the cargo.

Documents on the reasons for the failure to preserve the cargo or baggage (commercial act, general form act, etc.) drawn up by the carrier unilaterally are subject to assessment by the court in case of a dispute, along with other documents certifying the circumstances that may serve as a basis for the liability of the carrier, the sender or the recipient of the cargo or baggage.

### Personal injury and death

Damage caused to the health of the passenger through the fault of the carrier is compensated according to the general rules of the Civil Code, only if the contract has not established an increased level of responsibility.

If a citizen is injured or otherwise damaged his health, the compensation for the lost earnings (income) that he had or could definitely have, as well as additional costs incurred caused by damage to health, including the cost of treatment, additional food, the purchase of medicines, prosthetics, outside care, spa treatment, purchase of special vehicles, training for another profession, if it is established that the victim needs these types of assistance and care and is not entitled to receive them free of charge.

In determining the lost earnings (income), the disability pension assigned to the victim in connection with injury or other damage to health, as well as other pensions, benefits and other similar payments assigned both before and after the injury to health, are not taken into account and are not entail a reduction in the amount of compensation for harm (not counted towards compensation for harm). The earnings (income) received by the victim after damage to health shall not be counted towards compensation for harm. In the event of injury or other damage to the health of a minor who has not reached fourteen years of age (minor) and does not have earnings (income), the person responsible for the harm caused is obliged to reimburse the costs caused by the damage to health.



Upon reaching the minor victim of fourteen years of age, as well as in the case of causing harm to a minor between the ages of fourteen and eighteen years old who has no earnings (income), the person responsible for the harm caused is obliged to compensate the victim, in addition to the costs caused by damage to health, also the harm associated with the loss or decrease of his working capacity, based on the value of the subsistence minimum of the working-age population as a whole in the Russian Federation established in accordance with the law.

If at the time of damage to his health, the minor had earnings, then the harm is compensated based on the amount of this earnings, but not lower than the minimum subsistence level of the working-age population as a whole in the Russian Federation established in accordance with the law.

#### b. Limitation of liability

The law does not limit any rights of the carrier as such. There is a limitation of the carrier's liability (Article 170 of the RF KTM).

#### c. Jurisdiction options

Two procedures are available for the passenger:

1. Conciliation, when, with the help of a lawyer or a representative, a passenger enters into negotiations to reach a pre-trial agreement.
2. The passenger acts as a plaintiff in a court.

#### d. Insurance requirements for the Carrier

The carrier's civil liability for harm to life, health, property of passengers during transportation is subject to insurance in the manner and under the conditions established by the Federal Law. It is prohibited to carry passengers by a carrier, whose civil liability is not insured.

The object of insurance under a compulsory insurance contract is the carrier's property interests associated with the risk of his civil liability for obligations arising from damage to the life, health, property of passengers during transportation.

The term of the compulsory insurance contract cannot be less than a year. When transporting by inland waterway transport, the validity period of the compulsory insurance contract may be less than a year but may not be less than the navigation period.

The compulsory insurance contract may not establish a deductible for the risks of civil liability of the carrier for causing harm to the life or health of passengers.

#### e. Contract and actual carriers; tour operators

Regulated by article 187 Merchant Shipping Code of RF.

If the actual carrier is entrusted with the carriage of a passenger or part of it, the carrier nevertheless bears responsibility in accordance with the rules for the entire carriage of the passenger. In this case, the actual carrier bears the obligations and has the rights provided for by the rules established by the MSC.

With regard to the carriage of a passenger by the actual carrier, the carrier is responsible for the actions or omissions of the actual carrier, its employees or agents who have acted within the limits of their duties (powers).

Any agreement that the actual carrier assumes obligations not imposed on him by the rules established by the KTM RF, or waives the rights granted by such rules, is valid for the actual carrier only if he has his consent to do so in writing.

In the event that the carrier and the actual carrier are liable, their liability is joint and several.

#### f. Special rules for package travel (EU / EEA)

Within the framework of the EVRAZes (Eurasian Economic Community) and CIS regulations, there is no regulatory rules for “package sea travel”. The practice of concluding package travel services is used in the Commonwealth of Independent States, but only in relation to land tourism.

Directive of the European Parliament and the Council of the EU of November 25, 2015 No. 2015/2302 / EC on package tours and related tourist services does not apply for Russia.

#### g. Special features

##### Federal legislation regarding passenger rights.

At the federal level, the following acts can be distinguished:

##### Civil Code of the Russian Federation

Both the contract for the carriage of passengers and the contract for the provision of tourist services, in essence, are a *contract for the provision of services for compensation*, the general provisions of which are regulated by the Civil Code.

Under the contract for the carriage of a passenger, the carrier undertakes to deliver the passenger to the point of destination (as well as the passenger's baggage) and the passenger undertakes to pay the established fare for travel.

The conclusion of the contract for the carriage of a passenger is certified by a *ticket*, and the delivery of baggage by the passenger by a *baggage receipt*.

The passenger has the right, in the manner prescribed by the relevant transport charter, code or other law:

- to carry children with you free of charge or on other preferential terms;
- carry with you hand luggage free of charge within the established norms;
- check in baggage for carriage for a fee at the tariff.

##### Merchant Shipping Code of the Russian Federation

Under the contract for the carriage of passengers by sea, the carrier undertakes to transport the passenger to the point of destination and, in the event that the passenger deposits luggage, also deliver the luggage to the point of destination (and issue it to the person entitled to receive the luggage). The passenger undertakes to pay the fare set for the journey when checking in the baggage and the baggage transportation fee.

A *carrier* is a person who has entered into an agreement for the carriage of a passenger by sea or on whose behalf such an agreement has been concluded, regardless of whether the passenger is actually carried by such a person or by the actual carrier.

A *passenger* is an individual who has entered into an agreement for the carriage of a passenger by sea, or an individual for the carriage of which a ship charter agreement has been concluded.

The conclusion of the contract for the carriage of passengers by sea is certified by a *ticket*, the passenger's baggage - by a *baggage check*.

The fare of the passenger and the fare for the carriage of his baggage are determined by agreement of the parties.

The fare for the passenger's travel and the payment for the carriage of his baggage by public transport are determined on the basis of the tariffs approved in the manner established by the legislation of the Russian Federation.

The passenger has the right:

- carry with you free of charge, in foreign traffic - in accordance with the reduced rate for one child under two years of age without providing him with a separate seat. Other children under the age of two, as well as children between the ages of two and twelve, are transported in accordance with a preferential tariff with separate seats;
- carry with you free cabin luggage within the established norm.

The passenger has the right, before the departure of the vessel, as well as after the start of the voyage in any port where the vessel will enter for embarkation or disembarkation of passengers, to withdraw from the contract of carriage of passengers by sea.

If the passenger canceled the contract for the carriage of passengers by sea no later than the period established by the rules for the carriage of passengers by sea, approved by the federal executive body in the field of transport, or did not appear at the departure of the ship due to illness, or, before the departure of the ship, refused the contract of carriage of the passenger by sea due to illness or for reasons beyond the control of the carrier, the passenger shall be refunded all the fare and baggage charges paid by him.

#### The Consumer Protection Act

The provision of transportation or travel services will be inextricably linked with legislation on the protection of consumer rights, that is, persons purchasing goods or services for personal or family needs. The consumer has the right to refuse to execute the contract, subject to compensation for all costs incurred by the other party. The consumer also has the right to receive compensation (refund) for poor quality services. If the company does not satisfy the consumer's claims on a voluntary basis, the court may also award a forfeit, compensation for non-pecuniary damage and a fine in the amount of 50 % of all satisfied claims.

## **4.5 Canada<sup>110</sup>**

Canada is a confederation whose jurisdictions and powers are limited by the Constitution Act, 1867.<sup>111</sup> Also limited by this Act are the powers of Canada's federal authority which has sole jurisdiction over navigation and shipping throughout the country's navigable waters, both internal and external.

Canada's authority over its external waters is limited to its territorial sea (12 NM from Canada's jurisdictional coastline) and the adjoining Exclusive Economic Zone (which stretches 200 NM beyond the jurisdictional coastline).<sup>112</sup> Such waters may be further extended depending on the nature of the underlying continental shelf.

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<sup>110</sup> Prepared by Peter J Cullen, Senior Counsel with Stikeman Elliott LLP (Montreal, QC) with the assistance of Simon Ledsham, associate with Stikeman Elliott LLP (Montreal, QC).

<sup>111</sup> 30 & 31 Vict, c 3, ss 91 and ff.

<sup>112</sup> *Oceans Act*, S.C. 1996, c. 31. (NM refers to nautical miles).

Canada is largely, but not solely, a common law jurisdiction with sources deriving from English common law as practiced in its territories and provinces, with the exception of the Province of Quebec. The latter practices civil law, with sources deriving from the civil law traditions of France. It is beyond the scope of this paper to delve into the particular liability regimes of these legal traditions as practised in Canada (in contract and tort, or obligations and delict) which in any event would have limited application to Arctic matters, given Canada's federal jurisdiction over navigable waters and its federal statutory regime with respect to shipping in its Arctic waters.

a. Carrier liability (personal injury, accidents, cancellation, delay and baggage)

Through Canada's Marine Liability Act<sup>113</sup> (the Act), Part 4, Canada has adopted Articles 1 to 22 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Schedule 1) as amended by the Protocol of 1990 to amend the Convention (Schedule 2) (collectively, the "Athens Convention"). These articles provide a liability regime for the wrongful death of or personal injury to a passenger and the loss of or damage to luggage during the course of any carriage as defined in the Athens Convention.

However, the Act generally excludes adventure tourism activities that meet the following conditions;

- they expose participants to an aquatic environment; they normally require safety equipment and procedures beyond those normally used in the carriage of passengers;
- participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers;
- the risks have been presented to the participants and they have accepted in writing to be exposed to them;<sup>114</sup>

In such instances the liability will be judged by the scope and enforcement of the risk waivers (item (d) below) under applicable law (nevertheless, as the Act's definition of "passenger" for the purposes of limiting liability includes "a participant in an adventure tourism activity," adventure tourism operators are entitled to limit their liability under Part 3 of the Act<sup>115</sup>). Similarly, the Act does not deal with cancellation issues which, generally speaking, will be subject to the scope and enforcement of contractual terms under applicable law.

We note that what constitutes an "adventure tourism activity" is not entirely clear and will be subject to interpretation, as the Act does not define the term.<sup>116</sup> While s. 37.1(1) provides criteria for an adventure tourism activity to benefit from the exclusion from Part 4 of the Act, there are potentially other activities that could meet these criteria but that may not fit the commonly-understood meaning of "adventure tourism". In this context (for the sake of argument), while a whale-watching expedition in a small rigid-hulled inflatable boat would certainly involve additional safety equipment / procedures and risk, would an operator that ferries passengers aboard such a boat (say at sea, between two remote landings), with similar equipment and risks, fall within the adventure tourism exclusion?

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<sup>113</sup> S.C. 2001, c. 6 [MLA].

<sup>114</sup> *Ibid* at s. 37.1(1).

<sup>115</sup> See MLA, *supra* note 113 at s. 24; note that the inclusive definition of "passenger" at s. 24 does not apply to Part 4, which expressly excludes participants in adventure tourism.

<sup>116</sup> Observations from parliamentary debates provide some insight but are not authoritative. See e.g., Canada, Parliament, *House of Commons Debates*, 40th Parl, 2nd Sess, Vol 144, No 36 (30 Mar 2009) at 1600, where Mr. Jim Maloway, M.P. stated that "Upon reading the bill, it seems to me that the current legislation gives equal liability treatment to passengers or customers whether they are riding a ferry or on a sightseeing trip. The same treatment is given to people who are involved in much more risky activities, such as white water rafting, kayaking, whale watching or Zodiacs. People involved in those sorts of activities are accepting a much higher risk than people riding ferries or on sightseeing cruises" (our underlining). See also *Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited*, 2014 NSSC 217 (CanLII) at para 13, where the Court remarked in *obiter* that a river rafting excursion would appear to constitute an "adventure tourism activity" within the meaning of the Act.

The Act makes clear that rights of recovery include the dependents of the injured or deceased person(s), and that the scope of recovery may include compensation for guidance, care and companionship, as well as any amount to which a public authority may be subrogated in respect of payments consequent on the injury or death that are made to or for the benefit of the injured or deceased person or dependent. In the assessment of damages, any amount paid or payable on the death of the deceased person or any future premiums payable under a contract of insurance are not to be taken into account.

Such claims must be brought within two years after the cause of action arose, or after the time of death.

#### b. Limitation of liability

The Act provides for limitation for liability in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol, Articles 1 to 15 which are set forth in Part 1 of Schedule 1 and Article 18 which is set forth in Part 2 of that Schedule as set forth in the Act. In respect of passengers, this includes persons carried on board a commercial vessel (other than paying passengers) and participants in adventure tourism.<sup>117</sup>

The Act provides a range of limits for loss of life or personal injury depending on the size of the vessel.

#### c. Jurisdiction options (forum)

As Articles 1 to 22 of the *Athens Convention* have force of law in Canada pursuant to the Act, an action by a passenger under Part 4 of the Act may be instituted in the following jurisdictions, but only in a state party to the *Athens Convention*:<sup>118</sup>

*(a) the court of the place of permanent residence or principal place of business of the defendant, or*

*(b) the court of the place of departure or that of the destination according to the contract of carriage, or*

*(c) a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or*

*(d) a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.*<sup>119</sup>

In Canada, the Federal Court has broad jurisdiction over maritime, navigation and shipping matters pursuant to the Federal Courts Act.<sup>120</sup> However, the Superior Courts of each province and territory enjoy concurrent original jurisdiction with the Federal Court in maritime matters, allowing passengers to file an action in either system. Some inferior provincial courts, such as small claims courts, have also been vested with maritime jurisdiction by legislative grant and may hear maritime passenger claims.<sup>121</sup>

While passengers may attempt to sue under provincial consumer protection laws (especially to circumvent choice of forum clauses in contracts of carriage), the expansive reach of Canadian maritime

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<sup>117</sup> See note 115, *supra*.

<sup>118</sup> While Canada is not a party to, and has not ratified, the *Athens Convention*, s. 38 of the MLA designates Canada as a State Party for the purposes of the application of Schedule 2.

<sup>119</sup> See MLA, *supra* note 113 at Schedule 2, art 17.

<sup>120</sup> R.S.C., 1985, c. F-7 at s. 22.

<sup>121</sup> See Aldo Chircop, William Moreira, Hugh Kindred and Edgar Gold, eds., *Canadian Maritime Law*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2016) at 188-89.

law has led courts to reject consumer protection claims and apply maritime law instead.<sup>122</sup> Canadian courts generally enforce forum selection clauses; however, the statutory choice of forum granted to passengers by Article 17 of the Athens Convention supersedes any such clause for claims made pursuant to the Act.<sup>123</sup>

#### d. Insurance requirements for the carriers

Since January 11, 2019, the Regulations Respecting Compulsory Insurance for Ships Carrying Passengers<sup>124</sup> make liability insurance coverage of \$250,000 per passenger mandatory for carriers of passengers on voyages between Canadian ports. Notable exemptions from this requirement include international cruises (as these sail from or to ports outside of Canada) and “adventure tourism activities” (according to the definition in s. 37.1(1) of the Act).<sup>125</sup>

#### e. Contracting and actual carriers and tour operators

The Athens Convention, as codified in Schedule 2 of the Act, distinguishes the “carrier”, who concludes the contract of carriage, from the “performing carrier”, who owns, operates or chartered the ship performing the voyage.<sup>126</sup> While the obligations in Schedule 2 apply in full to the carrier, these only apply to a performing carrier for “the part of the carriage performed by him”.<sup>127</sup> The carrier and performing carrier are jointly and severally liable to the passenger, each conserving his recourse against the other.<sup>128</sup>

#### f. Package travel special rules (EU/EEA)

N/A

#### g. Special features

N/A

### **5. Terms of carriage or tickets**

The above national summaries set out the background law. The actual right of an individual passenger may give rise to *choice of law* and *forum shopping* issues that must be resolved on the facts of the individual case. Further, calculating the recoverable loss and which types of damages are allowed will likely differ from jurisdiction to jurisdiction.

Shipowners and tour operators traditionally provide their services subject to certain terms and conditions; possibly stated in the ticket or other travel document. Such terms normally address at least the following issues:

- Carrier’s/Operators’ liberties
- Cancellation and changes to the schedule

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<sup>122</sup> See e.g., *Racette c. Norwegian Cruise Line*, 2019 QCCQ 3817 (CanLII), *Beaumont c. Norwegian Cruise Line Holdings Ltd.*, 2018 QCCQ 6477 (CanLII) and *Princess Cruises v. Nicolazzo*, 2009 CanLII 28217 (ON SCDC). The leading Supreme Court of Canada cases on the definition of Canadian maritime law are *ITO-Int’l Terminal Operators v. Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752 and *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 SCR 437.

<sup>123</sup> See *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (CanLII), [2003] 1 SCR 450; see Chircop et. al. (2016), *supra* note 121 at 675; see MLA, *supra* note 113 at Schedule 2, Art 17.

<sup>124</sup> SOR/2018-245 [Insurance Regulations].

<sup>125</sup> See Insurance Regulations, *supra* at s. 2. For discussion of the definition of “adventure tourism activities”, see note 116, *supra*.

<sup>126</sup> See MLA, *supra* note 113 at Schedule 2, Art 1(1); see Chircop et. al. (2016), *supra* note 121 at 669.

<sup>127</sup> See MLA, *supra* note 113 at Schedule 2, Art 4(1); see Chircop et. al. (2016), *supra* note 121 at 669.

<sup>128</sup> See MLA, *supra* note 113 at Schedule 2, Arts 4(4), 4(5); see Chircop et. al. (2016), *supra* note 121 at 669.

- Exclusion of liability for excursions
- Exclusion of liability for loss of baggage
- Limitation of liability
- Disclaimer for acts and omissions by third parties
- Obligations on the part of the passenger to comply with applicable law and guidelines
- Choice of law
- Jurisdiction/venue for disputes
- Price changes
- Duty to notify complaints
- Time limits
- Force majeure
- Reference to applicable conventions

Only the price, time for travel and level of accommodation are normally agreed with the passengers individually. And this “agreement” usually entails that the passengers picks from the options that are available from the carrier.

The unique nature of the travel and special risks are sometimes highlighted by the operator:

*“The trips offered by [ ] are mainly conducted in “marginal zones” and require the qualification of expedition trips to places where infrastructure and (medical) facilities are often lacking. On booking the trip, the contracting party fully understands that those trips can not be comparable with any other trip. If for any reason such as but not limited to weather conditions, sea currents, nautical reasons, ice-conditions etc., the decision is taken by [ ] to change the programme and/or the programme cannot be carried out according to the travel description and (certain) places described in the travel programme cannot be visited and/or [ ] deviates from the programme, if [ ] has the opinion that such deviation will benefit the quality of the programme, or the trip has to be postponed or (partly) cancelled, [ ] is not liable for any claims, such as but not limited to refunds, damages, non-fulfilled expectations etc. of the contracting party”<sup>129</sup>.*

This business practice is not different from other contracts involving carriage of passengers at sea and cruises. Thus, it entails the same generic problems such as formation of contracts and whether certain terms have been agreed (e.g. the “red hand” duty to highlight onerous terms, violation of mandatory law, the implication online contracting, consumer protection aspects of the contractual relationship and the non-contractual liability of actual/performing carriers. These problems are complex and may be treated differently in the five jurisdictions, but falls outside the scope of this report.<sup>130</sup>

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<sup>129</sup> Cf. those of the operator Oceanwide terms and conditions (oceanwide-expeditions.com).

<sup>130</sup> Reference is made to the available textbooks on the subject such as Lewins: International Carriage of Passengers by Sea (2016), Chircop et al: Canadian Maritime Law, (2nd ed 2016), Falkanger, & Bull & Brautaset: Scandinavian Maritime Law (4th ed 2017), Griggs et al: Limitation of Maritime Claims Limitation of Liability for Maritime Claims (4th ed. 2005), Tsimplis: “Carriage of Passengers”, Ch 6 in Y. Baatz et al, Maritime Law (4th ed 2018), F Berlingieri: International Maritime Conventions Volume I, the Carriage of Goods and Passengers by Sea (2014), Ch 4 “Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 2002”, Tsimplis, M. (2009): ‘Liability in respect of passenger claims and its limitation’, 15 JIML. A number of articles have further been published about particular passenger rights issues.

## 6. Conclusions

The above discussion supports the following high-level conclusions:

- Generally speaking, the passengers appears to be well protected; certainly not to a lesser degree just because of the setting
- “*It is what it is*”; the experience of Arctic tourism involves certain objective hazards, but the operators’ associations, national authorities and bodies like the Arctic Council appear to prioritize this business. All the Arctic coastline states have designated regulation of maritime traffic that serves to manage the special risks. Yet limited SAR capabilities seems to be a common trait of all the Arctic states; this will (or at least should) likely change as traffic increases
- The vast geographical area and scarce population/infrastructure create objective hazards that seem to be inherent
- The Arctic coastline states cooperates with a view to improving safety
- Some jurisdictions have special rules for adventure tourism. The passenger rights are not uniform. There are 4-5 different legal regimes
- As the US and Russia have not adopted the Athens Convention, their regimes differ
- Overall, the liability analysis is similar for most Arctic states due to the adoption of the Athens Convention in various forms, yet there are peculiarities in each jurisdiction
- Special hazards appear not to have had an impact on the law so far as liability for death and personal injury is concerned
- The terms of carriage may have a significant impact on the outcome of a dispute between a passenger and a carrier
- Greenland’s passenger capacity restrictions are an interesting mitigation measure for limited SAR resources
- The scarcity of accurate navigational surveys of Arctic waters, as evidenced in the case of the *Clipper Adventurer*, is clearly a risk common to all Arctic states
- Probably due to their scale, Canadian Arctic waters seem less tightly regulated than those of Alaska, Svalbard, and Greenland (e.g. no mandatory pilotage within a certain distance of the shore; there is no northern pilotage authority pursuant to the *Pilotage Act*)
- The adventure tourism exception seems to be unique to Canada
- Svalbard/Norway and Greenland seem very strong on consumer protection for package travel, delays, cancellations, etc.